

Exhibit 5
Deposition transcript of Kenneth Nemire

<p style="text-align: right;">Page 1</p> <p style="text-align: center;">IN THE UNITED STATES DISTRICT COURT DISTRICT OF SOUTH DAKOTA SOUTHERN DIVISION</p> <p>-----</p> <p>Courtney Jayne, Individually and as Personal Representative of the Estate of M.Z.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs. Case No. 4:18-CV-4088-KES</p> <p>City of Sioux Falls,</p> <p style="text-align: center;">Defendant.</p> <p>-----</p> <p style="text-align: center;">DEPOSITION OF KENNETH NEMIRE, Ph.D., CPE VOLUME I, PAGES 1 - 241 AUGUST 20, 2019</p> <p>(The following is the deposition of KENNETH NEMIRE, Ph.D., CPE, taken pursuant to Notice of Taking Deposition, via videotape, at Robins Kaplan, LLP, 800 LaSalle Avenue, Suite 2800, in the City of Minneapolis, State of Minnesota, commencing at approximately 9:03 o'clock a.m., August 20, 2019.)</p>	<p style="text-align: right;">Page 3</p> <p style="text-align: center;">P R O C E E D I N G S</p> <p>(Nemire Exhibits 1-2 marked for identification.)</p> <p>(Witness sworn.)</p> <p>KENNETH NEMIRE, Ph.D., CPE, Called as a witness, being first duly sworn, was examined and testified as follows:</p> <p style="text-align: center;">EXAMINATION</p> <p>BY MR. SIEFF:</p> <p>Q. State your name for the record, please.</p> <p>A. Kenneth Nemire.</p> <p>Q. And you are a -- hold a Ph.D.; is that correct?</p> <p>A. That's correct.</p> <p>Q. That Ph.D. is in experimental psychology; is that correct?</p> <p>A. Yes.</p> <p>Q. You received your Ph.D. from The University of California in Santa Cruz?</p> <p>A. Yes.</p> <p>Q. You also hold a Bachelor of Sciences in something called psychobiology; is that correct?</p> <p>A. Yes.</p> <p>Q. You are not a medical doctor; correct?</p>
<p style="text-align: right;">Page 2</p> <p>1 APPEARANCES:</p> <p>2 On Behalf of the Plaintiff:</p> <p>3 Philip Sieff</p> <p>4 Patricia Yocdicke</p> <p>5 ROBINS KAPLAN LLP</p> <p>6 800 LaSalle Avenue</p> <p>7 Suite 2800</p> <p>8 Minneapolis, Minnesota 55402-2015</p> <p>9</p> <p>10 On Behalf of the Defendant:</p> <p>11 James E. Moore</p> <p>12 Woods, Fuller, Shultz & Smith, P.C.</p> <p>13 P.O. Box 5027</p> <p>14 300 South Phillips Avenue</p> <p>15 Suite 300</p> <p>16 Sioux Falls, South Dakota 57117-5027</p> <p>17</p> <p>18 ALSO PRESENT:</p> <p>19 Ronald M. Huber, Videographer</p> <p>20</p> <p>21 EXAMINATION INDEX</p> <p>22 WITNESS EXAMINED BY PAGE</p> <p>23 Dr. Nemire Mr. Sieff 3</p> <p>24</p> <p>25 EXHIBIT INDEX</p> <p>EXHIBIT DESCRIPTION PAGE</p> <p>1 Nemire</p> <p>2 Kenneth Nemire, CV, Oct. 26, 2018, 3</p> <p>3 Jan. 31, 2019, 7 pgs.</p> <p>4 Nemire Report, HUMAN FACTORS 3</p> <p>5 ANALYSES OF A FALL AND DROWNING IN</p> <p>6 A RIVER AT FALLS PARK, SIOUX FALLS,</p> <p>7 SOUTH DAKOTA, 34 pgs.</p> <p>8 Photo, 1 pg. 234</p> <p>9 email, Hall to Kirkus, Kearney and 236</p> <p>10 Leonard, Aug. 26, 2018, with</p> <p>11 attached photo, 2 pgs.</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 4</p> <p>A. That's correct.</p> <p>Q. All right. Dr. Nemire, you are testifying today on behalf of the defendant, the City of Sioux Falls; is that correct?</p> <p>A. Yes.</p> <p>Q. You were hired to do so by the City of Sioux Falls and its attorney, Mr. Moore; --</p> <p>A. Yes.</p> <p>Q. -- is that correct?</p> <p>"Yes"?</p> <p>A. Yes.</p> <p>Q. Did you bring your file with you today?</p> <p>A. Yes.</p> <p>Q. Whereabouts is it?</p> <p>A. In front of me.</p> <p>Q. All right. We'll take a look at that in a minute.</p> <p>You're familiar with the deposition process; is that correct?</p> <p>A. Yes.</p> <p>Q. You've testified approximately 110 times in the past four years; does that sound about right?</p> <p>A. Four years?</p> <p>Q. Yes.</p> <p>A. No.</p>

<p style="text-align: right;">Page 5</p> <p>1 Q. The last 10 years?</p> <p>2 A. Yeah, I don't know where that number -- you</p> <p>3 got that number.</p> <p>4 Q. Well, sure. Let's take a look at where I</p> <p>5 got that number.</p> <p>6 A. Well you said "testified," that would</p> <p>7 include deposition as well as trial?</p> <p>8 Q. Yes.</p> <p>9 Before we get down to the number of</p> <p>10 depositions you've given. I will ask you this</p> <p>11 question: It's fair to say, is it not, sir, that in</p> <p>12 terms of your employment at the moment, approximately</p> <p>13 100 percent of your work is for lawyers.</p> <p>14 A. A hundred percent of paid work is for</p> <p>15 forensic cases, yes.</p> <p>16 Q. You currently work or operate a business</p> <p>17 called HFE Consulting; is that right?</p> <p>18 A. Yes.</p> <p>19 Q. And that's located in the San Francisco</p> <p>20 area; is that correct?</p> <p>21 A. Yes.</p> <p>22 Q. And you are the president of that</p> <p>23 corporation?</p> <p>24 A. Yes.</p> <p>25 Q. It is a corporation?</p>	<p style="text-align: right;">Page 7</p> <p>1 "Consumer Perception of Portable Ladder Hazards and</p> <p>2 Warnings."</p> <p>3 Q. It dealt with warnings and ladders; correct?</p> <p>4 A. That's correct.</p> <p>5 Q. All right. On March 13, 2017 you were</p> <p>6 placed under oath in the state of Nevada in a case</p> <p>7 known as Yglesias, Y-G-L-E-S-I-A-S is the plaintiff,</p> <p>8 and you were asked how many times have you had your</p> <p>9 deposition taken. Your answer was a hundred maybe.</p> <p>10 A. Oh, in my -- in my career, yes.</p> <p>11 Q. Starting when?</p> <p>12 A. 1991.</p> <p>13 Q. When was your first deposition?</p> <p>14 A. I don't recall.</p> <p>15 Q. It's fair to say that you're conversant with</p> <p>16 the litigation process?</p> <p>17 A. At least giving depositions, yes.</p> <p>18 Q. All right. And you're familiar with the</p> <p>19 obligations of a person who claims to be an expert in</p> <p>20 a litigation setting?</p> <p>21 A. Yes.</p> <p>22 Q. In fact you've written articles explaining</p> <p>23 how to be an advocate as an expert witness; isn't that</p> <p>24 true?</p> <p>25 A. I wouldn't call it that way. I wouldn't</p>
<p style="text-align: right;">Page 6</p> <p>1 A. Yes.</p> <p>2 Q. And it's organized and operates under the</p> <p>3 laws of the State of California; is that correct?</p> <p>4 A. Yes.</p> <p>5 Q. You are the sole employee; is that correct?</p> <p>6 A. Yes.</p> <p>7 Q. And the purpose of HFE Consulting is to</p> <p>8 provide what is called forensic services of some sort</p> <p>9 for attorneys; is that right?</p> <p>10 A. Consulting services, yes.</p> <p>11 Q. What percentage of the work that you do is</p> <p>12 for lawyers?</p> <p>13 A. Paid work is a hundred percent.</p> <p>14 Q. All right.</p> <p>15 A. I also do research and write articles for</p> <p>16 peer-reviewed publications which takes up a</p> <p>17 substantial amount of my time.</p> <p>18 Q. When was the last peer-review article that</p> <p>19 you wrote and had published; when was that?</p> <p>20 A. There's one that's in press this year, it</p> <p>21 will be published in October of this year.</p> <p>22 Q. How about before that?</p> <p>23 A. Last year.</p> <p>24 Q. What was that article about?</p> <p>25 A. (Witness reviewing documents.) It's titled</p>	<p style="text-align: right;">Page 8</p> <p>1 characterize that -- any of those articles in that</p> <p>2 way.</p> <p>3 Q. Let me ask you this question, Dr. Nemire.</p> <p>4 You're here today claiming to be an expert and you're</p> <p>5 retained by the defendant to testify as an expert.</p> <p>6 Let me ask you a general question.</p> <p>7 What do you perceive to be your purpose in</p> <p>8 this case?</p> <p>9 A. To educate the trier of fact about the human</p> <p>10 factors issues relevant to this injury incident.</p> <p>11 Q. Define "human factors" for the jury.</p> <p>12 A. Human factors has to do with designing</p> <p>13 things that people use so that they can use them</p> <p>14 safely and well. Those things can be anything as</p> <p>15 simple as a toothbrush, or as complicated as a user</p> <p>16 interface for a nuclear power plant. In this case the</p> <p>17 things that people use would include, you know, like</p> <p>18 sidewalks and the natural features of the river</p> <p>19 environment, as well as warnings that were in the</p> <p>20 park.</p> <p>21 Q. You view your purpose is to educate the jury</p> <p>22 regarding the human factors issues that are present in</p> <p>23 this case. Fair?</p> <p>24 A. Yes.</p> <p>25 Q. And you have defined for us what you mean by</p>

<p style="text-align: right;">Page 9</p> <p>1 "human factors"; true?</p> <p>2 A. Yes.</p> <p>3 Q. You are not here to educate the jury on any</p> <p>4 other subject other than the human factors issues;</p> <p>5 correct?</p> <p>6 A. As defined in my report, yes.</p> <p>7 Q. And as you've explained it to us today; --</p> <p>8 A. Yes.</p> <p>9 Q. -- correct?</p> <p>10 So you're not here to provide or to educate</p> <p>11 the jury on medical issues; correct?</p> <p>12 A. That's correct.</p> <p>13 Q. Nor governmental issues; right? How a</p> <p>14 government operates; how governments make policy</p> <p>15 decisions.</p> <p>16 A. That's correct.</p> <p>17 Q. You're not here to educate the jury on law</p> <p>18 enforcement issues; correct?</p> <p>19 A. That's correct.</p> <p>20 Q. You're not here to educate the jury on</p> <p>21 issues pertaining to landscape architecture; true?</p> <p>22 A. Unless they are relevant to human factors.</p> <p>23 Q. Are you an expert in landscape architecture?</p> <p>24 A. I am not.</p> <p>25 Q. All right. You're not here to educate the</p>	<p style="text-align: right;">Page 11</p> <p>1 comes to monitoring children, as that may be subsumed</p> <p>2 within the expertise of child care; correct?</p> <p>3 A. I would go back to what I just told you --</p> <p>4 Q. All right.</p> <p>5 A. -- about --</p> <p>6 Q. In your ex -- The basis --</p> <p>7 A. -- the level of my expertise as described in</p> <p>8 my report.</p> <p>9 Q. Right. And that's based on your bachelor's</p> <p>10 degree in psychobiology, which you received in 1980;</p> <p>11 correct?</p> <p>12 A. Yes.</p> <p>13 Q. And whatever things you have read since that</p> <p>14 relate to the monitoring of children; correct?</p> <p>15 A. Sure.</p> <p>16 Q. Anything else?</p> <p>17 A. Based on my expertise as an experimental</p> <p>18 psychologist -- psychologist.</p> <p>19 Q. Any other basis for your claimed expertise</p> <p>20 in the monitoring of children?</p> <p>21 A. No.</p> <p>22 Q. Are you able to tell me what you have read</p> <p>23 related to the monitoring of children?</p> <p>24 A. I've cited some articles in my report.</p> <p>25 There's an article by Barbara Morrongiello. There is</p>
<p style="text-align: right;">Page 10</p> <p>1 jury on child-rearing issues; are you, sir?</p> <p>2 A. As I indicate in my report, I have opinions</p> <p>3 about supervision/monitoring of children by parents</p> <p>4 and caregiver -- adult caregivers.</p> <p>5 Q. Do you have expertise that you claim in</p> <p>6 child rearing?</p> <p>7 A. No.</p> <p>8 Q. Do you have expertise that you claim in</p> <p>9 areas involving child care?</p> <p>10 A. The issues that I would be testifying about</p> <p>11 as -- and as indicated in my report have to do with</p> <p>12 research on brain maturation of children and how that</p> <p>13 affects their perceptual and cognitive abilities,</p> <p>14 and how that means that adult caregivers need to</p> <p>15 monitor and supervise young children.</p> <p>16 Q. Do you claim to be an expert in matters</p> <p>17 related to child care?</p> <p>18 A. Regarding the necessity to monitor children,</p> <p>19 which would fall under child care, based on my</p> <p>20 bachelor's in psychobiology and based on my reading of</p> <p>21 literature in child development and supervisory</p> <p>22 control of children.</p> <p>23 Q. When did you receive your bachelor's degree?</p> <p>24 A. 1980.</p> <p>25 Q. 1980. So you claim to be an expert, when it</p>	<p style="text-align: right;">Page 12</p> <p>1 some material in a book called Human Factors:</p> <p>2 Designing Environments For Children, and a book on</p> <p>3 developmental psychology by Cole & Cole.</p> <p>4 Q. Anything else?</p> <p>5 A. No. That's relevant to this case.</p> <p>6 Q. Was that three --</p> <p>7 Well I'm asking you what you have read that</p> <p>8 forms the basis for your claim to be an expert in</p> <p>9 child monitoring derived in part from your readings in</p> <p>10 that area.</p> <p>11 A. Well my --</p> <p>12 Q. If there is additional readings that you --</p> <p>13 A. Right.</p> <p>14 Q. -- believe support your claim of expertise,</p> <p>15 I'd appreciate you telling me.</p> <p>16 A. I think those readings are sufficient and</p> <p>17 relevant to support my opinions in this case about the</p> <p>18 necessity for parental monitoring.</p> <p>19 Q. In the past you have been part of</p> <p>20 presentations to people in your field about how to</p> <p>21 persuasively present expert human factors testimony to</p> <p>22 the trier of fact; true?</p> <p>23 A. I don't think I would characterize it as</p> <p>24 "persuasively." One paper was -- or is a panel</p> <p>25 presentation. I'd have to --</p>

<p style="text-align: right;">Page 13</p> <p>1 Q. Let me --</p> <p>2 A. -- read it here.</p> <p>3 Q. Let me help you, doctor.</p> <p>4 A. Okay.</p> <p>5 (Discussion off the stenographic record.)</p> <p>6 BY MR. SIEFF:</p> <p>7 Q. Doctor, in 2011 at the proceedings which I</p> <p>8 assume to be a convention of some sort of the Human</p> <p>9 Factors and Economics [Ergonomics] Society you were</p> <p>10 part of a panel that gave a presentation on "What Do</p> <p>11 Human Factors/Ergonomic Experts Have to Tell Juries</p> <p>12 That They Don't Know - But May Think They Know";</p> <p>13 correct?</p> <p>14 A. That's correct.</p> <p>15 Q. And then in 2012, at the same group, the</p> <p>16 Human Factors and Ergonomics Society Proceedings, you</p> <p>17 presented, as part of a panel, on Examples of How to</p> <p>18 Present Human Factors Testimony to the Trier of Fact;</p> <p>19 true?</p> <p>20 A. That's correct.</p> <p>21 Q. And as part of the 2012 panel presentation</p> <p>22 it was explained to the other human factors folks that</p> <p>23 were at those proceedings that human factors experts,</p> <p>24 quote, have an obligation to both our client and our</p> <p>25 discipline to present sound opinions in a compelling</p>	<p style="text-align: right;">Page 15</p> <p>1 educate and/or advise the jurors about matters they</p> <p>2 cannot be expected to understand or to discover on</p> <p>3 their own?</p> <p>4 A. That's correct.</p> <p>5 Q. Do you agree with that?</p> <p>6 Conversely, would you agree that there is no</p> <p>7 need for you to educate or advise the jurors about</p> <p>8 matters that they can be expected to understand or</p> <p>9 discover on their own?</p> <p>10 A. Well the purpose of an expert is to help</p> <p>11 juries understand, so the -- that phrase that they</p> <p>12 would not be able -- that juries would not be able to</p> <p>13 understand or discover on their own I think is not</p> <p>14 quite accurate. You know, a jury member may be able</p> <p>15 to discover human factors principles by reading a</p> <p>16 book, for example.</p> <p>17 Q. Do you believe a human factors expert is</p> <p>18 necessary to educate or advise a juror in Sioux Falls,</p> <p>19 South Dakota about a matter that they can be expected</p> <p>20 to understand all by themselves?</p> <p>21 A. I guess I need to learn more about what you</p> <p>22 mean, "understand by themselves."</p> <p>23 Q. Well --</p> <p>24 A. I believe that a human factors expert is</p> <p>25 necessary to help the jury understand the relevant</p>
<p style="text-align: right;">Page 14</p> <p>1 manner, end quote.</p> <p>2 True?</p> <p>3 A. I don't remember that quote, but --</p> <p>4 Q. Well why don't --</p> <p>5 A. -- I would not --</p> <p>6 Q. Do you need a copy of your article?</p> <p>7 A. -- disagree with it.</p> <p>8 Sure.</p> <p>9 Q. Why don't you read what I've highlighted in</p> <p>10 the second paragraph.</p> <p>11 A. (Witness reviewing document.) Yes, --</p> <p>12 Q. Okay.</p> <p>13 A. -- that's what it says.</p> <p>14 Q. All right. "Compelling manner" is</p> <p>15 synonymous with "in a persuasive manner"; true?</p> <p>16 A. I disagree. I think "compelling" might be</p> <p>17 more engaging, something that might hold the attention</p> <p>18 of a jury as opposed to persuading them.</p> <p>19 Q. The same article states, quote, the human --</p> <p>20 the forensic human factors specialist is an advocate.</p> <p>21 Do you agree that you're supposed to be an</p> <p>22 advocate here today?</p> <p>23 A. Advocate for human factors, yes.</p> <p>24 Q. Okay. And do you agree that part of your</p> <p>25 role here today, as a human factors expert, is to</p>	<p style="text-align: right;">Page 16</p> <p>1 human factors issues in this case.</p> <p>2 Q. The same presentation given in 2011 of what</p> <p>3 you -- of which you were a panel member, said: The</p> <p>4 role of an expert is, quote, to educate the trier of</p> <p>5 fact, the jury, or in some cases the judge, with</p> <p>6 regard to information that is beyond their, quote,</p> <p>7 common sense, end quote, or personal experience.</p> <p>8 Stated differently: The expert is there to educate</p> <p>9 and/or advise the jurors about matters they cannot be</p> <p>10 expected to understand or discover on their own, end</p> <p>11 quote.</p> <p>12 A. Without the expert opinion of the human</p> <p>13 factors expert.</p> <p>14 Q. Did I misread what that article says?</p> <p>15 A. I would assume that you read it correctly,</p> <p>16 --</p> <p>17 Q. All right.</p> <p>18 A. -- and I am -- I am trying to clarify what</p> <p>19 that sentence --</p> <p>20 Q. Would you --</p> <p>21 A. -- says.</p> <p>22 Q. -- agree that an expert in human factors is</p> <p>23 not necessary in order to educate the jury with regard</p> <p>24 to information that is within their common sense?</p> <p>25 A. The problem with the term "common sense" is</p>

<p style="text-align: right;">Page 17</p> <p>1 that there is can be common sense, so-called</p> <p>2 common-sense knowledge that is inaccurate for any</p> <p>3 number of reasons.</p> <p>4 Q. Is it your testimony that a human factors</p> <p>5 expert has greater expertise in common sense than a</p> <p>6 juror in Sioux Falls, South Dakota?</p> <p>7 A. Common sense has a number of different</p> <p>8 definitions. Common sense can be correct, it can be</p> <p>9 not correct, and there are some issues that might be</p> <p>10 considered common sensical, but in fact the common</p> <p>11 sense understanding of an issue is -- is incorrect,</p> <p>12 according to scientific evidence.</p> <p>13 Q. You testified that your purpose here today</p> <p>14 is to educate the jury regarding human factors issues</p> <p>15 present in this case. In doing so, would you agree</p> <p>16 that it's necessary and vital for you to respect the</p> <p>17 role of the Court in these proceedings; the judge?</p> <p>18 A. Yes.</p> <p>19 Q. Would you agree that as part of your purpose</p> <p>20 in educating the jury regarding human factors issues</p> <p>21 present in this case that it's important, if not</p> <p>22 vital, that you respect the role of the jurors in this</p> <p>23 case?</p> <p>24 A. Yes.</p> <p>25 Q. And respect the role that the law itself may</p>	<p style="text-align: right;">Page 19</p> <p>1 not correct or suspect in some way.</p> <p>2 Q. Are you able to identify each and every</p> <p>3 decision with respect to the credibility of witness</p> <p>4 testimony in this case that you have made?</p> <p>5 A. I'm sorry. Ask the question again.</p> <p>6 Q. Are you able to tell us each piece of</p> <p>7 witness testimony that you have judged to either be</p> <p>8 credible or, more importantly, not credible?</p> <p>9 A. We would have to walk through every</p> <p>10 statement made and all the transcripts and all the</p> <p>11 statements to the police.</p> <p>12 Q. So you've --</p> <p>13 Is it fair to say that you have made</p> <p>14 determinations as to the credibility of witness</p> <p>15 statements in this case in more than one instance?</p> <p>16 A. Yes.</p> <p>17 Q. More than two instances?</p> <p>18 A. Yes.</p> <p>19 Q. Many, many instances.</p> <p>20 A. Most likely.</p> <p>21 Q. You have determined the credibility of a</p> <p>22 witness testimony in this case based upon written</p> <p>23 documentation; namely, the transcripts. Correct?</p> <p>24 A. Well you used the word -- I just picked up</p> <p>25 on the word "determined." I've evaluated the</p>
<p style="text-align: right;">Page 18</p> <p>1 play in this case.</p> <p>2 A. Yes.</p> <p>3 Q. You have written a detailed report regarding</p> <p>4 your findings in this case and your opinions; true?</p> <p>5 A. Yes.</p> <p>6 Q. And we will get to that in a moment in some</p> <p>7 detail, but before we do that I have one question for</p> <p>8 you. In arriving at your opinions did you make any</p> <p>9 judgements as to the credibility of any of the</p> <p>10 evidence that you reviewed?</p> <p>11 A. Yes.</p> <p>12 Q. Tell me, which ones?</p> <p>13 A. I evaluate all the pieces of evidence that</p> <p>14 come before me to evaluate which would be -- would be</p> <p>15 useful in me understanding how an incident occurred</p> <p>16 and what might have prevented the incident.</p> <p>17 Q. In the course of conducting your</p> <p>18 investigation, reaching your findings and opinions,</p> <p>19 did you make any judgements as to the credibility of</p> <p>20 any testimony of any witness in this matter?</p> <p>21 A. Yes.</p> <p>22 Q. Who?</p> <p>23 A. All the deposition transcripts and all the</p> <p>24 statements that I read, I always evaluate statements</p> <p>25 or descriptions that may appear correct or may appear</p>	<p style="text-align: right;">Page 20</p> <p>1 credibility based on statements to the police and in</p> <p>2 deposition transcripts. I can't determine the</p> <p>3 credibility because there's no way to do that after</p> <p>4 the fact.</p> <p>5 Q. In evaluating the credibility of a witness</p> <p>6 in this case, did you make any subsequent judgment as</p> <p>7 to whether or not any particular piece of testimony or</p> <p>8 evidence offered by a witness was or was not credible?</p> <p>9 A. I would have to take case by case.</p> <p>10 Q. The answer is either "yes" or "no." Either</p> <p>11 you made judgements as to the credibility of witness</p> <p>12 testimony, or you did not.</p> <p>13 A. I have weighed evidence more strongly than</p> <p>14 others.</p> <p>15 Q. You have weighed evidence more strongly than</p> <p>16 others. Whose evidence? Which pieces of evidence?</p> <p>17 A. Yeah, we'd have to go case by case.</p> <p>18 Q. Is it fair to say that you weighed a</p> <p>19 considerable amount of evidence and determined whether</p> <p>20 some evidence was more -- weighted more strongly than</p> <p>21 other pieces of evidence?</p> <p>22 A. Yeah. I can't address that question in some</p> <p>23 blanket, general, vague way. We'd have to -- We'd</p> <p>24 have to go step-by-step through -- you know, you</p> <p>25 clearly have, you know, some issues that you might</p>

<p style="text-align: right;">Page 21</p> <p>1 want to discuss, and we can discuss each of those</p> <p>2 point by point if you like.</p> <p>3 Q. What I'm --</p> <p>4 A. But a blanket statement I cannot make.</p> <p>5 Q. You've testified that you have reviewed</p> <p>6 witness testimony vis-à-vis the transcripts, and you</p> <p>7 have weighed evidence and considered some evidence</p> <p>8 more strongly than other evidence. True?</p> <p>9 A. Yes.</p> <p>10 Q. In other words, you have given more</p> <p>11 credibility to some pieces of evidence than other</p> <p>12 pieces of evidence; true?</p> <p>13 A. I would not agree with the -- with the term</p> <p>14 "credibility." I would say that -- that I've -- I've</p> <p>15 assigned weight to some pieces of information that</p> <p>16 have come before me more than other pieces of</p> <p>17 information. That doesn't mean that -- necessarily</p> <p>18 that one piece of information is more credible. It</p> <p>19 could be that someone has a false memory of what has</p> <p>20 occurred, so for them it's quite credible, even though</p> <p>21 it's a false memory.</p> <p>22 Q. Who in this case do you believe has a false</p> <p>23 memory?</p> <p>24 A. We'd have to go case by case.</p> <p>25 Q. Do you believe any person in this case has a</p>	<p style="text-align: right;">Page 23</p> <p>1 A. I don't know how many.</p> <p>2 Q. And as well as all the depositions in this</p> <p>3 giant notebook here; right?</p> <p>4 A. I don't know what's in your notebook.</p> <p>5 Q. Well it's all the deposition exhibits.</p> <p>6 A. I have reviewed the depositions that are</p> <p>7 listed in my report.</p> <p>8 Q. Did you review the deposition exhibits?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. And you had an opportunity, as you've</p> <p>11 testified, to get ready for this deposition today.</p> <p>12 A. Yes.</p> <p>13 Q. "Yes"?</p> <p>14 So my question to you, sir, is again, tell</p> <p>15 me which individual in this -- the case, of all the</p> <p>16 people who were involved and have been deposed, you</p> <p>17 believe has a false memory.</p> <p>18 A. Again we'll have to go case by case. If you</p> <p>19 have an issue with some of my opinions and want to</p> <p>20 examine the support for my opinions and some of that</p> <p>21 support has to do with the statements made or</p> <p>22 statements omitted in supporting my opinions, then I'm</p> <p>23 happy to do that. But a blanket statement I think</p> <p>24 is -- I don't -- I'm not willing to entertain.</p> <p>25 Q. So when you say you do believe some people</p>
<p style="text-align: right;">Page 22</p> <p>1 false memory? Is that your claim?</p> <p>2 A. I think that is a possibility, yes.</p> <p>3 Q. Who?</p> <p>4 A. We would have to go case by case.</p> <p>5 Q. You've had an opportunity to prepare for</p> <p>6 this deposition; true?</p> <p>7 A. Yes.</p> <p>8 Q. You've had an opportunity to review every</p> <p>9 piece of information that's been generated in this</p> <p>10 case; hasn't it?</p> <p>11 A. Yes.</p> <p>12 Q. Has any piece of information that you've</p> <p>13 asked from your lawyer been denied to you?</p> <p>14 A. Not that I'm aware.</p> <p>15 Q. Have you asked your attorney -- asked Mr.</p> <p>16 Moore, who's hired you, for any piece of information</p> <p>17 and not received it?</p> <p>18 A. I have not.</p> <p>19 Q. Okay. So you've had an opportunity to</p> <p>20 review numerous depositions; yes?</p> <p>21 A. Yes.</p> <p>22 Q. And go to the site; yes?</p> <p>23 A. Yes.</p> <p>24 Q. And review upwards of 36, I believe,</p> <p>25 separate items of documentation; yes?</p>	<p style="text-align: right;">Page 24</p> <p>1 in this case have evidenced false memory, you're</p> <p>2 unwilling to tell us who those individuals are.</p> <p>3 A. Well it's -- we'd need to walk through and</p> <p>4 see what comes out.</p> <p>5 Q. And you have given certain pieces of</p> <p>6 evidence more weight than other pieces of evidence;</p> <p>7 correct?</p> <p>8 A. Yes. I would say that, yes.</p> <p>9 Q. Have you determined that some of the</p> <p>10 witnesses are more credible in their testimony than</p> <p>11 other witnesses?</p> <p>12 A. No.</p> <p>13 Q. Not at all?</p> <p>14 A. No.</p> <p>15 Q. Even the ones who have false memories?</p> <p>16 A. Yes.</p> <p>17 Q. When were you hired on this case?</p> <p>18 A. (Witness reviewing documents.) May 13 of</p> <p>19 this year.</p> <p>20 Q. After Joellen Gill issued her report;</p> <p>21 correct?</p> <p>22 A. I don't remember the date of her report.</p> <p>23 Q. The date of her report was April 25th of</p> <p>24 2018.</p> <p>25 A. Yes, I do remember having a conversation at</p>

<p style="text-align: right;">Page 25</p> <p>1 some point with --</p> <p>2 Q. Were you --</p> <p>3 A. -- Mr. Moore about Ms. Gill's report.</p> <p>4 Q. Was one of the reasons you were hired was to</p> <p>5 rebut or refute her opinions?</p> <p>6 A. Well it was certainly in response to her</p> <p>7 opinions I was asked to evaluate human factors issues</p> <p>8 in this case. At some point I was told in general</p> <p>9 what Ms. Gill had to say about the issues in this</p> <p>10 case.</p> <p>11 Q. When you say at some point you were told</p> <p>12 about her opinions in this case, when -- when was</p> <p>13 that? Was that when you were hired?</p> <p>14 A. It probably would have been before May 13th.</p> <p>15 We had phone conversations.</p> <p>16 Q. So before May 13th you were advised of Ms.</p> <p>17 Gill's opinions; correct?</p> <p>18 A. Yeah. The first contact was March 21st.</p> <p>19 Q. And you were advised --</p> <p>20 A. I'm sorry. The first contact was March</p> <p>21 19th.</p> <p>22 Q. What were you told on March 19th?</p> <p>23 A. I was called by Jordan Feist from Woods</p> <p>24 Fuller, and he told me some general information about</p> <p>25 a child drowning in a city park, fell in the river,</p>	<p style="text-align: right;">Page 27</p> <p>1 A. I don't know.</p> <p>2 Q. Well, do you keep billing records?</p> <p>3 A. Yes.</p> <p>4 Q. Did you bring those with you today?</p> <p>5 A. Yes.</p> <p>6 Q. Would you look at your file and tell me how</p> <p>7 many hours you have into this case?</p> <p>8 A. I'm in the process of doing that. (Witness</p> <p>9 reviewing documents.) So far I've billed for about</p> <p>10 \$40,000, so you'll have to divide by 450 to come up</p> <p>11 with the number of hours.</p> <p>12 Q. A little under a hundred hours, give or</p> <p>13 take. Ninety? Sound about right?</p> <p>14 A. Sure. Whatever that math is.</p> <p>15 Q. How much time, in terms of hours, have you</p> <p>16 spent preparing for your deposition?</p> <p>17 A. Yeah, I don't know, five to ten maybe.</p> <p>18 Q. And then do you charge for travel from</p> <p>19 California?</p> <p>20 A. Yes. I charge travel expenses, plus time</p> <p>21 that I cannot do anything else.</p> <p>22 Q. Okay. So we'll call that five hours? And</p> <p>23 you charge for your time in your deposition today;</p> <p>24 yes?</p> <p>25 A. Yes. I think you're on the hook for that.</p>
<p style="text-align: right;">Page 26</p> <p>1 and that I would be contacted later by Mr. Moore or</p> <p>2 Ms. Carpenter.</p> <p>3 Q. Okay. So that was in March of '18; right?</p> <p>4 March of 2018?</p> <p>5 A. It was March 19th of 2019.</p> <p>6 Q. 2019. Okay.</p> <p>7 And you were contacted by someone affiliated</p> <p>8 with Mr. Moore's office; right?</p> <p>9 A. That's correct.</p> <p>10 Q. Okay. When was your next contact with Mr.</p> <p>11 Moore's office?</p> <p>12 A. I must have received an email on March 21st</p> <p>13 asking me to send a copy of my CV and retention</p> <p>14 agreement.</p> <p>15 Q. Okay. Did you do that?</p> <p>16 A. I did.</p> <p>17 Q. Did you ask for a retainer?</p> <p>18 A. That's part of the retention agreement, yes.</p> <p>19 Q. How much was the retainer?</p> <p>20 A. Forty-five hundred dollars.</p> <p>21 Q. And you currently bill at four hundred fifty</p> <p>22 an hour; is that right?</p> <p>23 A. That's correct.</p> <p>24 Q. How many hours do you have so far into this</p> <p>25 case?</p>	<p style="text-align: right;">Page 28</p> <p>1 Q. Okay. And then you --</p> <p>2 You still get paid for it though; right?</p> <p>3 A. Yes.</p> <p>4 Q. And some follow-up work.</p> <p>5 So somewhere between, by my calculations, at</p> <p>6 the low end, ten hours to twenty hours at 450 dollars</p> <p>7 an hour to give a deposition.</p> <p>8 Now you have worked as a litigation expert</p> <p>9 for a number of years; true?</p> <p>10 A. Yes.</p> <p>11 Q. And you've done well over a hundred cases as</p> <p>12 a litigation expert; true?</p> <p>13 A. Yes.</p> <p>14 Q. For both sides of the fence, for plaintiffs</p> <p>15 and defendants; true?</p> <p>16 A. Yes.</p> <p>17 Q. And in most of those cases you're asked to</p> <p>18 evaluate a situation and write a report; true? As a</p> <p>19 general proposition?</p> <p>20 A. I would say most of the cases I am not asked</p> <p>21 to write a report.</p> <p>22 Q. In many of your cases you're asked to write</p> <p>23 a report?</p> <p>24 A. I have written many reports, yes.</p> <p>25 Q. And then asked to give a deposition or some</p>

<p style="text-align: right;">Page 29</p> <p>1 form of testimony.</p> <p>2 A. At some point the case might go that far,</p> <p>3 yes.</p> <p>4 Q. It's fair to say, isn't it, that if you</p> <p>5 write a report or reach opinions that are adverse to</p> <p>6 the party that has hired you, you're not going to be</p> <p>7 giving a deposition in that case; are you?</p> <p>8 A. I have a vague recollection that there have</p> <p>9 been times where, you know, I have had opinions that</p> <p>10 were consistent with my client's theory of the case,</p> <p>11 and some that were not consistent and still went</p> <p>12 forward to give a deposition.</p> <p>13 Q. It's financially advantageous to you and</p> <p>14 your corporation for you to reach opinions that are</p> <p>15 favorable to the party representing you as that may</p> <p>16 lead to additional work on a case; true?</p> <p>17 A. I guess I don't like the implications of</p> <p>18 what you have said.</p> <p>19 Q. It's a simple question.</p> <p>20 A. There have been --</p> <p>21 Well, yes. There have been a number of</p> <p>22 times when I've told potential clients that I cannot</p> <p>23 help them because from their description of the case I</p> <p>24 did not think that I could help them. You know, based</p> <p>25 on science and research I didn't feel as if I could</p>	<p style="text-align: right;">Page 31</p> <p>1 Q. And that you currently I believe live in</p> <p>2 Campbell, California, or is that your office?</p> <p>3 A. That's the office.</p> <p>4 Q. Where do you live?</p> <p>5 A. Yeah, that's personal information --</p> <p>6 Q. All right.</p> <p>7 A. -- that I don't provide in depositions.</p> <p>8 Q. Do you live in the San Francis --</p> <p>9 Sure.</p> <p>10 Do you live in the San Francisco area?</p> <p>11 A. Yes.</p> <p>12 Q. All right. Are you married, sir?</p> <p>13 A. Again, that's personal information.</p> <p>14 Q. Do you have children?</p> <p>15 A. Personal information.</p> <p>16 Q. I think that whether you have children or</p> <p>17 not might be relevant to expertise in raising</p> <p>18 children, so I'm going to ask you again.</p> <p>19 Do you have children?</p> <p>20 A. And as I said, my expertise regarding</p> <p>21 monitoring has to do with reviewing research</p> <p>22 literature and -- on brain maturation and research on</p> <p>23 injuries resulting from lack of parental supervision,</p> <p>24 et cetera.</p> <p>25 Q. So under PROFESSIONAL EXPERIENCE we have a</p>
<p style="text-align: right;">Page 30</p> <p>1 help them with their case and so did not take the</p> <p>2 case.</p> <p>3 Q. Putting in front of you what's been marked</p> <p>4 as Nemire Exhibit I, this was a document provided to</p> <p>5 me by defense counsel. Would you agree that this is</p> <p>6 what is called a curriculum vitae, or some may call it</p> <p>7 a resume, others may call it a detailed recitation of</p> <p>8 your experience and background?</p> <p>9 A. I call it a CV, yes.</p> <p>10 Q. All right. Well not everybody uses Latin,</p> <p>11 so I thought maybe we'd make it easy for those folks.</p> <p>12 A. Okay.</p> <p>13 Q. This is a accurate recitation of your</p> <p>14 background and experience; correct?</p> <p>15 A. Yes.</p> <p>16 Q. You prepared this document?</p> <p>17 A. I did.</p> <p>18 Q. And you provided it to counsel knowing it</p> <p>19 would be provided as part of the litigation process;</p> <p>20 correct?</p> <p>21 A. Yes.</p> <p>22 Q. All right. This document, Exhibit I, your,</p> <p>23 as you call it, curriculum vitae, says that you formed</p> <p>24 HFE Consulting LLC in 1999; correct?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 32</p> <p>1 heading for Forensic Human Factors Consulting; right?</p> <p>2 A. Yes.</p> <p>3 Q. And underneath that it says: "Human factors</p> <p>4 consulting for litigation support, both plaintiff and</p> <p>5 defense." That's, in essence, litigation work; right?</p> <p>6 A. That's correct.</p> <p>7 Q. Court work; right? I mean for --</p> <p>8 A. Very few of my cases go to trial.</p> <p>9 Q. Legal work.</p> <p>10 A. Legal work.</p> <p>11 Q. All right. And you do testify on behalf of</p> <p>12 both plaintiff and defense; yes?</p> <p>13 A. I have, yes.</p> <p>14 Q. Okay. And the majority, if not all of your</p> <p>15 income, comes from that type of work, litigation work.</p> <p>16 A. That's correct.</p> <p>17 Q. All right. And this details your</p> <p>18 specialties when it comes to forensic human factors</p> <p>19 consulting, i.e., litigation work; right?</p> <p>20 A. It provides an outline of that information,</p> <p>21 that's correct.</p> <p>22 Q. It says "specialties."</p> <p>23 A. That's correct.</p> <p>24 Q. It doesn't say "outline," it says</p> <p>25 "specialties"; right?</p>

<p style="text-align: right;">Page 33</p> <p>1 A. Okay.</p> <p>2 Q. And you list a number of specialties.</p> <p>3 A. Yes.</p> <p>4 Q. Okay. Human factors/ergonomics; human</p> <p>5 performance/information processing; lighting,</p> <p>6 visibility, conspicuity; driver and pedestrian</p> <p>7 perception and behavior; perception-response time;</p> <p>8 visual-motor coordination; slip, trip, misstep, falls;</p> <p>9 product design, liability (including medical,</p> <p>10 consumer, construction products); warnings, signs,</p> <p>11 interactions; human-machine interaction;</p> <p>12 control/display layout; and safety.</p> <p>13 You claim expertise in all of those areas;</p> <p>14 is that correct?</p> <p>15 A. Yes.</p> <p>16 Q. In the past you've worked, according to your</p> <p>17 CV, on cases involving falls, warnings, workplace</p> <p>18 incidents, products liability, vehicle incidents and</p> <p>19 human-machine interaction.</p> <p>20 Are there any broad categories of cases that</p> <p>21 you've worked on that you feel relevant to tell us</p> <p>22 about today that would be germane to -- to this case?</p> <p>23 A. I have had cases that's similar; children</p> <p>24 falling down utility holes, you know, that still falls</p> <p>25 under -- falls under the category of trip, slip and</p>	<p style="text-align: right;">Page 35</p> <p>1 possibilities, but it's not possible to determine</p> <p>2 which of those two occurred.</p> <p>3 MR. SIEFF: I will move to strike that</p> <p>4 answer as nonresponsive.</p> <p>5 I will repose the question. And Debby, if</p> <p>6 you would be so kind as to read it to Dr. Nemire.</p> <p>7 (Record read by the reporter from</p> <p>8 Page 34, Lines 15 to 19.)</p> <p>9 A. Again, no. It's not possible to determine</p> <p>10 if it's more likely or not that she tripped, and it's</p> <p>11 not lik -- it's not possible to determine that it's</p> <p>12 most likely or not that she took an air step.</p> <p>13 Q. You had an opportunity to review your report</p> <p>14 that you authored before coming in here today?</p> <p>15 A. Yes.</p> <p>16 Q. And in fact you did review it?</p> <p>17 A. Yes.</p> <p>18 Q. And in your report you state that all of</p> <p>19 your opinions or conclusions are final to a reasonable</p> <p>20 degree of scientific certainty.</p> <p>21 A. Yes.</p> <p>22 Q. Those are your words.</p> <p>23 A. Later on it says I have the -- reserve the</p> <p>24 right to amend my opinions, you know, should other</p> <p>25 information come forward.</p>
<p style="text-align: right;">Page 34</p> <p>1 falls, but those are the broad categories of cases.</p> <p>2 Q. Just so the jury is clear, you're not</p> <p>3 claiming that Maggie tripped and fell in this case;</p> <p>4 are you?</p> <p>5 A. I don't think anybody knows.</p> <p>6 Q. I'm asking you are you making that claim,</p> <p>7 that she tripped and fell into the water?</p> <p>8 A. I think it's a possibility, yes.</p> <p>9 Q. Okay. Based on what?</p> <p>10 A. The -- The uneven surface of the top of the</p> <p>11 canyon wall, the direction of forward movement</p> <p>12 described by Jeremy as he watched Maggie fall into the</p> <p>13 river are consistent with a trip and fall.</p> <p>14 Q. Okay. Are --</p> <p>15 Will you be testifying, or is it your</p> <p>16 intention to testify, to a reasonable degree of</p> <p>17 scientific certainty, that it is more likely than not</p> <p>18 that Maggie Zaiger tripped and fell into the water on</p> <p>19 March 18th, 2018?</p> <p>20 A. I think the two most likely scenarios are</p> <p>21 that she tripped and fell, or she took what's called</p> <p>22 an air step. She stepped into the foam, perhaps</p> <p>23 believing that there was a rock surface underneath and</p> <p>24 not -- not having any solid, stable surface to step on</p> <p>25 and then she fell. So those are the two most likely</p>	<p style="text-align: right;">Page 36</p> <p>1 Q. All right. I'll ask you this broad</p> <p>2 question: Are --</p> <p>3 Have any of the opinions that you've</p> <p>4 expressed in your report been amended, or do you</p> <p>5 intend on amending them today?</p> <p>6 A. Yeah, I don't recall right now whether I</p> <p>7 mentioned the possibility of a trip or -- Oh, I did</p> <p>8 mention that the rocks posed a trip hazard, but I</p> <p>9 don't believe my report specifies one way or the other</p> <p>10 whether it was a air step or a trip and fall.</p> <p>11 Q. Isn't it true that your report does not</p> <p>12 state that you believe, to a reasonable degree of</p> <p>13 scientific certainty, that it is more likely than not</p> <p>14 that Maggie Zaiger tripped and fell into the river?</p> <p>15 A. I'm sorry. What's the question again?</p> <p>16 Q. Isn't that true?</p> <p>17 Isn't it true that nowhere in your report do</p> <p>18 you state that it is your opinion that Maggie Zaiger</p> <p>19 tripped and fell into the water?</p> <p>20 A. (Witness reviewing documents.) Yeah, I did</p> <p>21 not address the mechanism of fall in the report</p> <p>22 because the report was addressing Ms. Gill's opinions.</p> <p>23 Q. So you were retained simply to testify that</p> <p>24 the expert who has been retained by Maggie's mother</p> <p>25 was wrong; is that right?</p>

<p style="text-align: right;">Page 37</p> <p>1 A. No.</p> <p>2 Q. Okay. Now isn't it true that in your field,</p> <p>3 people with the exact same credentials and experience</p> <p>4 as you have, or perhaps even more, may disagree with</p> <p>5 your opinions on any matter involving human factors?</p> <p>6 I mean, that's a --</p> <p>7 A. What's the question again?</p> <p>8 Q. -- fair statement.</p> <p>9 Don't people in your field disagree</p> <p>10 frequently with each other?</p> <p>11 A. Well --</p> <p>12 Q. In other words, human factors experts can</p> <p>13 reach different conclusions about a matter involving</p> <p>14 human factors.</p> <p>15 A. I can agree with that statement.</p> <p>16 Q. All right. And you have seen that happen</p> <p>17 before with some regularity in your field.</p> <p>18 A. Certainly in litigation there are typically</p> <p>19 human factors experts on both sides of the case.</p> <p>20 Q. And even in academia, people with expertise</p> <p>21 disagree; true?</p> <p>22 A. People with expertise can disagree about</p> <p>23 some things, yes.</p> <p>24 Q. Well aren't there plenty of examples in the</p> <p>25 world today of people with scientific degrees and</p>	<p style="text-align: right;">Page 39</p> <p>1 chance that it's not true. So that of course leaves</p> <p>2 open the possibility that those results are not</p> <p>3 accurate just based on statistical probability.</p> <p>4 Q. According to --</p> <p>5 A. Now I've forgotten your question.</p> <p>6 Q. According to Exhibit 1, which is your CV, in</p> <p>7 2015, '16, '17, '18 and through part of '19 you</p> <p>8 testified 22 times.</p> <p>9 A. Okay.</p> <p>10 Q. All right?</p> <p>11 And we know you've testified more than that</p> <p>12 and have worked on more cases than that; true?</p> <p>13 A. Yes.</p> <p>14 Q. All right. And your company is a forensic</p> <p>15 human factors consulting firm; correct? I mean,</p> <p>16 that's what you do.</p> <p>17 A. That's the paid work that the company does</p> <p>18 is --</p> <p>19 Q. Sure.</p> <p>20 A. -- in forensics, yes.</p> <p>21 Q. Sure.</p> <p>22 Part of HFE Consulting, according to your</p> <p>23 website, is geared towards providing forensic human</p> <p>24 factors consulting.</p> <p>25 A. That's correct.</p>
<p style="text-align: right;">Page 38</p> <p>1 background disagreeing about things?</p> <p>2 A. Sure.</p> <p>3 Q. Like whether there's global warming, isn't</p> <p>4 that something that's people with claimed expertise</p> <p>5 disagree upon?</p> <p>6 A. Well 97 percent of scientists agree that</p> <p>7 there is global warming, there's 3 percent that do</p> <p>8 not.</p> <p>9 Q. Wasn't there a --</p> <p>10 A. So there's certainly -- yes, there is</p> <p>11 disagreement.</p> <p>12 Q. Wasn't there a point in time when 97 percent</p> <p>13 of learned people agreed the world was flat?</p> <p>14 A. Yes, that happened.</p> <p>15 Q. All right. The point being, people who are</p> <p>16 experts can disagree and still have expertise in their</p> <p>17 field; yes?</p> <p>18 A. That's certainly possible, yes.</p> <p>19 Q. Your field is not a science like mathematics</p> <p>20 where there is verifiable, quantifiable ways to</p> <p>21 determine the accuracy of an opinion.</p> <p>22 A. Human factors is based on research, and in</p> <p>23 conducting research the results are evaluated based on</p> <p>24 statistical principles, and the -- some results are</p> <p>25 accepted as true if there's five percent or less</p>	<p style="text-align: right;">Page 40</p> <p>1 Q. "Forensic" being, for those who might not</p> <p>2 know what that term means, relating or denoting the</p> <p>3 application of scientific methods and techniques to an</p> <p>4 investigation.</p> <p>5 A. I'm sorry, say that again.</p> <p>6 Q. Sure.</p> <p>7 Forensic --</p> <p>8 The definition of "forensic" is relating to</p> <p>9 or denoting the application of scientific methods</p> <p>10 and techniques to an investigation.</p> <p>11 A. Yes.</p> <p>12 Q. You agree with that definition.</p> <p>13 A. Yes.</p> <p>14 Q. And you agree that that's how a forensic</p> <p>15 human factors investigation should be conducted.</p> <p>16 A. Yes.</p> <p>17 Q. Applying scientific methods and techniques</p> <p>18 to whatever it is you're investigating.</p> <p>19 A. And scientific reasoning and -- Yes. And</p> <p>20 based on scientific research --</p> <p>21 Q. Okay.</p> <p>22 A. -- which uses the scientific method.</p> <p>23 Q. Now in the cases we know you've testified in</p> <p>24 the past few years, the 22 or so, those were all</p> <p>25 forensic human factors investigations and evaluations;</p>

<p style="text-align: right;">Page 41</p> <p>1 right?</p> <p>2 A. Yes.</p> <p>3 Q. So out of these 22 or so that you have done</p> <p>4 in the last five years, how many times were you --</p> <p>5 were your opinions right? Do you know?</p> <p>6 A. It's -- It --</p> <p>7 We typically can't know whether an opinion</p> <p>8 is right or not, just have to go with the research and</p> <p>9 evaluate the evidence and indicate, you know, whether</p> <p>10 something most likely or not occurred.</p> <p>11 Q. Sure.</p> <p>12 In other words, there's no way to quantify,</p> <p>13 in real terms, whether your opinion is right or wrong.</p> <p>14 A. Well I always base my opinions on scientific</p> <p>15 research. Scientific research is typically, you know,</p> <p>16 accurate, as I said, within five percent. Some</p> <p>17 research, such as warnings, indicates that people, you</p> <p>18 know, pay attention to warnings, say, 60 percent of</p> <p>19 the time or 90 percent of the time, which would</p> <p>20 indicate maybe there's 10 percent of the time people</p> <p>21 are not paying attention to warnings. So if I believe</p> <p>22 that a warning is sufficient and adequate to encourage</p> <p>23 someone to notice, read, understand and follow that</p> <p>24 warning, it's -- 90 percent of the people might follow</p> <p>25 that warning, but -- but there is always that 10</p>	<p style="text-align: right;">Page 43</p> <p>1 Q. Okay. You both have experience and</p> <p>2 background in the sciences, you can't both be correct</p> <p>3 at the same time. So my question to you, sir, is</p> <p>4 this:</p> <p>5 Is there a known and scientifically accepted</p> <p>6 method for quantifying or determining the error rate</p> <p>7 of a litigation forensic human factors expert's</p> <p>8 opinions in the litigation context?</p> <p>9 A. I think the issue here in comparing Ms.</p> <p>10 Gill's opinions with mine is that I use scientific</p> <p>11 research to support my opinions and she does not.</p> <p>12 Q. That we'll talk about.</p> <p>13 Is there a way to quantify an error rate as</p> <p>14 to the opinions you've expressed in prior cases or</p> <p>15 not?</p> <p>16 A. Well opinions in a prior case, there -- as</p> <p>17 in this case, there are many different opinions. So,</p> <p>18 you know, if I have ten opinions in this case, one of</p> <p>19 them may not be accurate based on actual events. That</p> <p>20 would still indicate that overall, you know, my</p> <p>21 opinions in this case were accurate and has a low</p> <p>22 error rate.</p> <p>23 You'd have to do a similar analyses across</p> <p>24 all the cases and all of Ms. Gill's cases, but there's</p> <p>25 no way of knowing what actually happened unless there</p>
<p style="text-align: right;">Page 42</p> <p>1 percent that may not notice it for whatever reason, or</p> <p>2 decide not to follow it.</p> <p>3 Q. Do -- Do you know if there has --</p> <p>4 Have you ever done an analysis looking</p> <p>5 backwards as to whether or not the opinions you have</p> <p>6 rendered in prior cases have been proven to be</p> <p>7 accurate and correct, or wrong?</p> <p>8 A. Yeah, there's no way of knowing that.</p> <p>9 Q. There's no way to quantify an error rate for</p> <p>10 your opinions; true?</p> <p>11 A. Well as I said, I base my opinions on</p> <p>12 scientific research and so it's more likely than not</p> <p>13 that my opinions are correct, but there's always the</p> <p>14 possibility that one of those opinions is not correct</p> <p>15 just because of the nature of statistics and human</p> <p>16 behavior.</p> <p>17 Q. Well, sir, you have opinions in this case</p> <p>18 that you claim are more likely than not correct; true?</p> <p>19 A. Yes.</p> <p>20 Q. Dr. Gill has opinions in this case --</p> <p>21 A. Ms. Gill.</p> <p>22 Q. Ms. Gill. Apologize.</p> <p>23 -- in this case which she believes are more</p> <p>24 likely than not correct; true?</p> <p>25 A. That's what she says, yes.</p>	<p style="text-align: right;">Page 44</p> <p>1 is video evidence.</p> <p>2 Q. In this particular case, sir, you have</p> <p>3 rendered opinions that have -- may have important</p> <p>4 consequences; true?</p> <p>5 A. Yes.</p> <p>6 Q. They may have financial consequences.</p> <p>7 A. Yes.</p> <p>8 Q. They may have deep and serious emotional and</p> <p>9 lasting psychological consequences for people; true?</p> <p>10 A. Yes.</p> <p>11 Q. And it's your testimony that some of your</p> <p>12 opinions may not be right and others may. Is that</p> <p>13 true?</p> <p>14 A. That's always the possibility, --</p> <p>15 Q. Right.</p> <p>16 A. -- just as with Ms. Gill's opinions.</p> <p>17 Q. And you understand that this is a very</p> <p>18 serious matter we're dealing with here.</p> <p>19 A. Yes.</p> <p>20 Q. And everything you have done up till now,</p> <p>21 according to your testimony, is based on applying the</p> <p>22 concepts of forensic human factors techniques and the</p> <p>23 application of scientific methods and techniques to an</p> <p>24 investigation; is that right?</p> <p>25 A. And relying on research that has used the</p>

<p style="text-align: right;">Page 45</p> <p>1 scientific method.</p> <p>2 Q. Sure.</p> <p>3 And the body of research in the field of</p> <p>4 human factors is extensive; is it not?</p> <p>5 A. Yes.</p> <p>6 Q. And in fact the book -- the textbook that</p> <p>7 you referenced earlier; do you recall talking about a</p> <p>8 textbook?</p> <p>9 A. I talked about several textbooks.</p> <p>10 Q. These textbooks you're talking about are --</p> <p>11 are big and dense; yes?</p> <p>12 A. Yes.</p> <p>13 Q. And isn't it true that the field of human</p> <p>14 factors is an evolving field?</p> <p>15 A. Yes.</p> <p>16 Q. And that opinions that may be universally</p> <p>17 shared or held by those in the human factors field may</p> <p>18 later turn out to be changed, or modified, or altered</p> <p>19 and no longer held to be the standard within that</p> <p>20 field?</p> <p>21 A. That is the nature of science, yes.</p> <p>22 Q. But it's true in your field; isn't it?</p> <p>23 A. Human factors is a science, as is</p> <p>24 experimental psychology, and so, as in all sciences,</p> <p>25 that would be true.</p>	<p style="text-align: right;">Page 47</p> <p>1 A. As I said, they rarely occur.</p> <p>2 Q. So, Dr. Nemire, your website indicates that</p> <p>3 you've been qualified as an expert in state courts,</p> <p>4 and that's an accurate statement; true?</p> <p>5 A. That's correct.</p> <p>6 Q. And you've also been qualified as an expert</p> <p>7 in federal courts; true?</p> <p>8 A. That's correct.</p> <p>9 Q. You've also been disqualified as an expert</p> <p>10 in state courts; true?</p> <p>11 A. That's not correct.</p> <p>12 Q. You've been disqualified as an expert in</p> <p>13 federal courts; true?</p> <p>14 A. That's not correct.</p> <p>15 Q. All right. We will come back to that.</p> <p>16 A. Yeah.</p> <p>17 Q. It's your testimony that proposed --</p> <p>18 You're testifying under oath today that</p> <p>19 testimony that you have proposed to give as an expert</p> <p>20 has never been rejected or disqualified by a federal</p> <p>21 or state court in the United States.</p> <p>22 A. That's true.</p> <p>23 Q. Are you familiar with a case entitled Weiss</p> <p>24 v. Holland American Line?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">Page 46</p> <p>1 Q. So it's fair to say that something that</p> <p>2 research claimed to be true in the human factors field</p> <p>3 in, say, 1990, may have already been disproven, or may</p> <p>4 later be disproven to be untrue. That's an accurate</p> <p>5 statement; isn't it?</p> <p>6 A. Well --</p> <p>7 Q. In fact it happens all the time; doesn't it?</p> <p>8 A. I think the research that I have used to</p> <p>9 support my opinions, you know, may be modified,</p> <p>10 standards may be modified. There's always research</p> <p>11 about how -- you know, what type of warning might be</p> <p>12 more effective; so yes, the field evolves.</p> <p>13 I don't know that I would agree with the</p> <p>14 characterization that most or many of those issues</p> <p>15 could be in disagreement in ten years. Human factors</p> <p>16 is a incremental science, it's not like physics where</p> <p>17 you might have revolutions in thought about how</p> <p>18 something occurs. Experimental psychology is also an</p> <p>19 incremental science. There's typically not any</p> <p>20 revolutionary changes -- There may be two evolutionary</p> <p>21 changes in understanding how the brain works in a</p> <p>22 couple thousand years of -- of trying to understand</p> <p>23 how the brain works. So revolutions like what you are</p> <p>24 describing rarely occur in the sciences.</p> <p>25 Q. They do occur; true?</p>	<p style="text-align: right;">Page 48</p> <p>1 Q. You were retained as an expert for the</p> <p>2 plaintiff in that case?</p> <p>3 A. Yes.</p> <p>4 Q. Whose name was Diane Weiss or Weiss, I don't</p> <p>5 know how she pronounces it.</p> <p>6 A. Yes.</p> <p>7 Q. And that was venued in the United States</p> <p>8 District Court, the Western District of Washington in</p> <p>9 Seattle; true?</p> <p>10 A. Yes.</p> <p>11 Q. And in that case Ms. Weiss, who was then 69</p> <p>12 years old and a veteran of cruise ships, was on a</p> <p>13 Holland America Line vessel from Fort Lauderdale</p> <p>14 Florida; true?</p> <p>15 A. I remember it was a cruise ship. I don't</p> <p>16 remember --</p> <p>17 Q. Sure.</p> <p>18 A. -- origin or destination.</p> <p>19 Q. And she was walking on the upper walking</p> <p>20 deck and the wind began to pick up and became windy</p> <p>21 enough that there were some whitecaps and whatnot on</p> <p>22 the sea, and at some point in time the vessel was</p> <p>23 pitching and rolling and she was injured is the sum</p> <p>24 and substance of that case.</p> <p>25 A. That's correct.</p>

<p style="text-align: right;">Page 49</p> <p>1 Q. And you were prepared to testify that the</p> <p>2 cruise ship -- you were going to testify in the</p> <p>3 particular context of cruise ship safety and charity</p> <p>4 walk risk management, as Ms. Weiss was involved in a</p> <p>5 charity walk at that time.</p> <p>6 A. She was, yes.</p> <p>7 Q. All right. Isn't it true that the District</p> <p>8 Court in Washington, the Federal District Court found</p> <p>9 that you'd failed to substantiate that you were</p> <p>10 qualified to opine on the context of cruise ship</p> <p>11 safety or charity walk risk management?</p> <p>12 A. No. There was a problem with the</p> <p>13 declaration, but I was -- I testified in court and</p> <p>14 testified to a number of issues at court. I don't</p> <p>15 remember which issues.</p> <p>16 Q. Isn't it true that para -- that four of your</p> <p>17 declarations, your opinions, were stricken by the</p> <p>18 federal court in that case?</p> <p>19 A. Four of my declarations?</p> <p>20 Q. Yes. Paragraphs 4 through 8 of your</p> <p>21 declaration.</p> <p>22 A. Oh, well that's the declaration. The issue</p> <p>23 with that declaration was I got a call the day --</p> <p>24 Q. I just asked you a simple question.</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 51</p> <p>1 A. -- that refers to that one declaration that</p> <p>2 was not accepted. I wrote a second declaration which</p> <p>3 was accepted, --</p> <p>4 Q. Isn't it true --</p> <p>5 A. -- and testified to those same issues in</p> <p>6 court.</p> <p>7 Q. Isn't it true that later -- in a later</p> <p>8 motion, the -- Well, I'll withdraw that.</p> <p>9 Were you retained in a case called Blomgren</p> <p>10 versus Town Square Las Vegas?</p> <p>11 A. Yes.</p> <p>12 Q. In that case isn't it true you were</p> <p>13 precluded from testifying that the defendant breached</p> <p>14 its duty of care as it relates to the plaintiff's</p> <p>15 injuries, or was otherwise negligent?</p> <p>16 A. I don't even recall giving a deposition in</p> <p>17 that case.</p> <p>18 Q. Were you precluded from testifying that a</p> <p>19 party breached its duty of care in the case of</p> <p>20 Blomgren versus Town Square Las Vegas?</p> <p>21 A. If that is true, I was not made aware of it.</p> <p>22 Q. Were you retained in a case called Morrow</p> <p>23 versus La Pinata of Alameda?</p> <p>24 A. I think that was a fall on a ramp at a</p> <p>25 restaurant. I gave a deposition in that case.</p>
<p style="text-align: right;">Page 50</p> <p>1 Q. Were paragraphs 4 through 8 stricken by the</p> <p>2 federal court?</p> <p>3 A. Well I think -- I think that entire</p> <p>4 declaration was not allowed and then I was allowed to</p> <p>5 -- I actually wrote a new declaration and that was</p> <p>6 accepted by the court and I was allowed to testify in</p> <p>7 the court.</p> <p>8 Q. Isn't it true that the Federal District</p> <p>9 Court in that case wrote that your report lacks an</p> <p>10 adequate basis in facts or data for the conclusions</p> <p>11 that he draws regarding safety concerns for charity</p> <p>12 walks as opposed to normal perambulation, the</p> <p>13 foreseeable physiological consequences of the On Deck</p> <p>14 for a Cure participants, or the effects of vessel</p> <p>15 motion on participants related to water conditions at</p> <p>16 the time of the event.</p> <p>17 A. As I said, that was a declaration that was</p> <p>18 not accepted for a number of reasons. I wrote a</p> <p>19 subsequent declaration which was accepted, and</p> <p>20 testified at court to those same issues.</p> <p>21 Q. The Federal District Court also wrote that</p> <p>22 your conclusory assertions are insufficiently helpful</p> <p>23 or supported.</p> <p>24 A. As I said, --</p> <p>25 Q. True?</p>	<p style="text-align: right;">Page 52</p> <p>1 Q. Isn't it true that the Court -- the judge in</p> <p>2 that case ruled that your testimony should be</p> <p>3 excluded?</p> <p>4 A. If that's true, I was not made aware of it.</p> <p>5 Q. Were you retained in Kurz, K-U-R-Z, versus</p> <p>6 Santa Clara Valley Transport?</p> <p>7 A. That doesn't ring a bell.</p> <p>8 Q. A case involving a alleged left turn by a --</p> <p>9 by the plaintiff's car into a light rail train?</p> <p>10 A. Oh, that was the off-duty police officer.</p> <p>11 Q. Isn't it true that the court in that case</p> <p>12 refused to consider your testimony and excluded it?</p> <p>13 A. That attorney told me that the case was not</p> <p>14 allowed to go forward on technical issues that had</p> <p>15 nothing to do with my testimony.</p> <p>16 Q. That's what you were told.</p> <p>17 A. That's what I was told.</p> <p>18 Q. You make no effort to determine whether the</p> <p>19 opinion you give in any particular case is ultimately</p> <p>20 admitted into court or excluded; is that true?</p> <p>21 A. There's a statement in my retention</p> <p>22 agreement that requires the client to notify me of --</p> <p>23 of any motions to exclude and to, you know, let me</p> <p>24 know about the results of that.</p> <p>25 Q. Do you make any independent effort, other</p>

<p style="text-align: right;">Page 53</p> <p>1 than that, to find out if your testimony was deemed</p> <p>2 admissible or not?</p> <p>3 A. I have not.</p> <p>4 Q. It's not important to you to know?</p> <p>5 A. It's not, no.</p> <p>6 Q. Okay. It's not important to you wheth -- to</p> <p>7 find out whether or not a court feels that you're</p> <p>8 following the appropriate standards for expert</p> <p>9 testimony?</p> <p>10 A. Well, yeah, that -- that has not been of</p> <p>11 concern to me.</p> <p>12 Q. Okay. We have --</p> <p>13 MR. SIEFF: Jim, if you wanted to take a</p> <p>14 break I'm going to switch matters. It's up to you.</p> <p>15 MR. MOORE: Sure. A short break is fine.</p> <p>16 THE REPORTER: Off the record, please.</p> <p>17 (Recess taken from 10:14 to 10:22 a.m.)</p> <p>18 BY MR. SIEFF:</p> <p>19 Q. Doctor, in rendering opinions an expert</p> <p>20 should not speculate; correct? You would agree with</p> <p>21 that?</p> <p>22 A. Yes.</p> <p>23 Q. And should not be guessing at things; you</p> <p>24 agree with that?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 55</p> <p>1 and flowing river."</p> <p>2 Read that correctly?</p> <p>3 A. Yes.</p> <p>4 Q. Okay. Number 3. "There was no failure of</p> <p>5 Defendant to adequately guard and warn of the subject</p> <p>6 hazardous area."</p> <p>7 I read that correctly?</p> <p>8 A. Yes.</p> <p>9 Q. Number 4. "Defendant's warning sign</p> <p>10 installed at Falls Park was adequately designed, and</p> <p>11 most likely was effective at warning of the subject</p> <p>12 hazards."</p> <p>13 I read that right?</p> <p>14 A. Yes.</p> <p>15 Q. Number 5. "Maggie's mother failed to</p> <p>16 adequately supervise Maggie."</p> <p>17 I read that right?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. Are there any other opinions, other</p> <p>20 than the five in which I have just read from your</p> <p>21 report, that you intend to present to a jury in Sioux</p> <p>22 Falls, South Dakota on this matter?</p> <p>23 A. At the moment, I don't --</p> <p>24 Well these are summary opinions, and I</p> <p>25 provide support for them and perhaps other opinions in</p>
<p style="text-align: right;">Page 54</p> <p>1 Q. And if assumptions are made those should be</p> <p>2 clearly identified; correct?</p> <p>3 A. Yes.</p> <p>4 Q. And an opinion should be rendered without</p> <p>5 bias?</p> <p>6 A. Yes.</p> <p>7 Q. And only within an area in which the expert</p> <p>8 has demonstrable expertise.</p> <p>9 A. Yes.</p> <p>10 Q. All right. And if the opinion is based on</p> <p>11 speculation, the expert -- Well, strike that question.</p> <p>12 I want to talk to you now about your report,</p> <p>13 and you have -- I have a copy here for you which has</p> <p>14 been marked as Nemire Exhibit 2. And I would like you</p> <p>15 to turn to the last page, page 13. At the bottom,</p> <p>16 under the heading SUMMARY, it says: "In summary, my</p> <p>17 opinions in this case are that:"</p> <p>18 Number "1. The rocky edge of the canyon</p> <p>19 walls and the swiftly flowing river presented open and</p> <p>20 obvious hazards to visitors."</p> <p>21 I read that correctly; yes?</p> <p>22 A. Yes.</p> <p>23 Q. Okay. Opinion number 2, "The foam on the</p> <p>24 river did not constitute a hazard separate from the</p> <p>25 open and obvious hazard of the rocky top of the canyon</p>	<p style="text-align: right;">Page 56</p> <p>1 the previous 13 pages. These are just, you know, the</p> <p>2 outline of the five opinions. I don't intend to</p> <p>3 provide opinions on any other issue that I can think</p> <p>4 of right now.</p> <p>5 Q. Well I think it's fair that we know all the</p> <p>6 opinions you're going to give so that we can talk</p> <p>7 about the basis for them and make sure they're</p> <p>8 adequately -- based on adequate facts --</p> <p>9 A. Right.</p> <p>10 Q. -- and not speculation.</p> <p>11 So if there are additional opinions that you</p> <p>12 are going to intend to give, can you identify them for</p> <p>13 me?</p> <p>14 A. As I said, I think this covers it.</p> <p>15 Q. All right. Thank you.</p> <p>16 A. It describes an outline of what's in the</p> <p>17 report.</p> <p>18 Q. All right. Is -- Are --</p> <p>19 Is there any additional work that you know</p> <p>20 you intend to do on this case between now and when it</p> <p>21 goes to trial?</p> <p>22 A. (Witness reviewing documents.) I think</p> <p>23 there's a -- another, I don't know that we'd call it</p> <p>24 an opinion. I provided additional materials in my</p> <p>25 binder that were not listed in the report.</p>

<p style="text-align: right;">Page 57</p> <p>1 Q. Well I will come to the materials you've</p> <p>2 looked at in a second. I just want to know if there's</p> <p>3 any other work you're planning on doing between now</p> <p>4 and the time of trial.</p> <p>5 A. I'm trying to answer your previous question</p> <p>6 about providing any other opinions at trial. I think</p> <p>7 that this other material -- the extensions of other</p> <p>8 materials in the first part of this report, but would</p> <p>9 not constitute an additional broad opinion.</p> <p>10 Q. I --</p> <p>11 Can you explain what you mean by that? I</p> <p>12 don't know what you mean.</p> <p>13 A. Sure. On opinion number 2, "The foam on the</p> <p>14 river did not constitute a hazard separate from the</p> <p>15 open and obvious hazard of the rocky top of the canyon</p> <p>16 and flowing river."</p> <p>17 Subsequent to the report --</p> <p>18 Subsequent to writing the report it occurred</p> <p>19 to me that there is another aspect to my support for</p> <p>20 that opinion that I did not discuss, and that was</p> <p>21 hindsight bias, so I provided a reference on hindsight</p> <p>22 bias in my binder that I did not reference in my</p> <p>23 report. Hindsight bias has to do with after you know</p> <p>24 the outcome, in this case of a -- of an incident, then</p> <p>25 you -- it is easy to identify factors that could have</p>	<p style="text-align: right;">Page 59</p> <p>1 Q. Sure.</p> <p>2 A. -- hindsight bias.</p> <p>3 Q. Wouldn't you agree that it's a little</p> <p>4 difficult for me to spend a lot of time asking you</p> <p>5 questions about hindsight bias when I haven't had the</p> <p>6 opportunity to study the issue before you came in here</p> <p>7 today?</p> <p>8 A. It may be.</p> <p>9 Q. Okay. And your report was rendered how long</p> <p>10 ago?</p> <p>11 A. It's dated Jul -- June 29th.</p> <p>12 Q. Okay. So almost two months ago; right?</p> <p>13 A. Sure.</p> <p>14 Q. Okay. When -- When did you realize that you</p> <p>15 should add this hindsight bias discussion to your</p> <p>16 opinions and -- and bases? You said at some point</p> <p>17 after writing your report.</p> <p>18 A. I don't know, maybe in the last several</p> <p>19 weeks --</p> <p>20 Q. Okay.</p> <p>21 A. -- when I was thinking more about the case.</p> <p>22 Q. Would that be in your file; would you have</p> <p>23 written down a note?</p> <p>24 A. I added it to a document called "file</p> <p>25 contents," and added the reference in my binder.</p>
<p style="text-align: right;">Page 58</p> <p>1 prevented that -- the actual outcome, but the</p> <p>2 information may not have been available to people</p> <p>3 involved in that incident before, in this case, the</p> <p>4 fall occurred.</p> <p>5 So with the foam, you know, afterwards, you</p> <p>6 know, people, you know, identifying foam as a hazard;</p> <p>7 how could it be a hazard? It could obscure the edges</p> <p>8 of the ledge. And those opinions after the 2018</p> <p>9 incident and -- are consistent with the hindsight</p> <p>10 bias. You know, after the 2018 incident occurred,</p> <p>11 then it might be easy to point at foam as a causal</p> <p>12 factor; whereas prior to the incident people involved</p> <p>13 with trying to make the area safe may not be aware of</p> <p>14 foam as a hazard.</p> <p>15 Q. Now this hindsight bias you're talking</p> <p>16 about, that doesn't appear anywhere in your report;</p> <p>17 correct?</p> <p>18 A. As I've described, yes.</p> <p>19 Q. Okay. And have you provided anything in</p> <p>20 writing to your -- to Mr. Moore on this hindsight</p> <p>21 bias?</p> <p>22 A. I have not, no.</p> <p>23 Q. Okay. So it hasn't been provided to me, you</p> <p>24 would agree with that, since it's not in writing; yes?</p> <p>25 A. Yes. There's a reference in my binder to --</p>	<p style="text-align: right;">Page 60</p> <p>1 Q. Did you date it?</p> <p>2 A. Date what?</p> <p>3 Q. Your note?</p> <p>4 A. There's no note other than --</p> <p>5 Q. You added something.</p> <p>6 A. -- my file contents.</p> <p>7 Q. Okay. Is there anything on what you added</p> <p>8 to your file contents that would tell us when you put</p> <p>9 it in the binder?</p> <p>10 A. No.</p> <p>11 Q. Okay. Other than that, your opinions -- the</p> <p>12 opinions that you -- Well, strike that.</p> <p>13 We were talking about additional work you</p> <p>14 wanted -- you needed to do or felt you needed to do.</p> <p>15 Other than the hindsight bias discussion, is</p> <p>16 there anything else that you intend on doing before we</p> <p>17 go to trial?</p> <p>18 A. I think those are two different things. You</p> <p>19 had asked me about other opinions, --</p> <p>20 Q. Right.</p> <p>21 A. -- and I used the hindsight bias as an</p> <p>22 example of materials that I have added to my binder</p> <p>23 that expand on the opinions provided in the report.</p> <p>24 This last question has to do with intended</p> <p>25 future research.</p>

<p style="text-align: right;">Page 61</p> <p>1 Q. Well let's --</p> <p>2 Then let's make sure we're clear.</p> <p>3 Are there any other opinions, other than</p> <p>4 what you've identified in paragraph 10 of your written</p> <p>5 report, and the expansion of those opinions through</p> <p>6 the hindsight-bias concept, that you intend on</p> <p>7 offering at the trial of this matter?</p> <p>8 A. And again hindsight bias is not a separate</p> <p>9 opinion.</p> <p>10 Q. Okay.</p> <p>11 A. It is an elaboration on -- on why foam may</p> <p>12 not be a causal factor in this case.</p> <p>13 Q. Let's incorporate that into one of these I</p> <p>14 through 5 opinions for the purpose of this question.</p> <p>15 A. Yes.</p> <p>16 Q. Are there additional opinions not laid out</p> <p>17 in your report, exclusive of hindsight bias, that you</p> <p>18 intend on offering at trial?</p> <p>19 A. Well again, hindsight bias -- I don't see</p> <p>20 hindsight bias as a separate opinion.</p> <p>21 Q. Okay. Fine.</p> <p>22 A. And so similarly, additional materials I</p> <p>23 have provided in my binder would be elaborations on</p> <p>24 opinions outlined in section 10 of my report, but not</p> <p>25 separate opinions.</p>	<p style="text-align: right;">Page 63</p> <p>1 between now and the time of trial relative to this</p> <p>2 case?</p> <p>3 A. Not that I'm aware of.</p> <p>4 Q. Any additional literature that you intend on</p> <p>5 relying upon at the time of trial other than what's</p> <p>6 been identified in your report?</p> <p>7 A. And the additional literature in my binder.</p> <p>8 Q. Is that different than what's in your</p> <p>9 report?</p> <p>10 A. As I said, there is some materials in my</p> <p>11 binder that I've not referenced in the report.</p> <p>12 Q. What are those?</p> <p>13 A. (Witness reviewing documents.) There are</p> <p>14 two papers on what's been termed illusory truth. One</p> <p>15 is -- the first author is Fazio, F-A-Z-I-O, written in</p> <p>16 2015 called Knowledge Does Not Protect Against</p> <p>17 Illusory Truth. The second article, first author is</p> <p>18 Hasher, written in 1977, titled Frequency and</p> <p>19 Conference of Referential Validity.</p> <p>20 Q. And those were not included in the many</p> <p>21 hours of work that went into your report; is that</p> <p>22 fair?</p> <p>23 A. That's correct.</p> <p>24 Q. And isn't it true that the conclusions or</p> <p>25 opinions of both those authors have been challenged by</p>
<p style="text-align: right;">Page 62</p> <p>1 Q. Other than what is in your report, are there</p> <p>2 opinions that have not been disclosed to me up to</p> <p>3 today that you intend on offering at the trial of this</p> <p>4 matter?</p> <p>5 A. If I am asked about the mechanism of fall,</p> <p>6 and I would say the same thing that we had discussed</p> <p>7 earlier about the mechanism of fall.</p> <p>8 Q. Why didn't you include that in your report?</p> <p>9 A. Through a conversation with Mr. Moore, we</p> <p>10 had decided that I would write a report rebutting</p> <p>11 opinions of Ms. Gill, and Ms. Gill did not address the</p> <p>12 mechanism of fall.</p> <p>13 Q. So you -- you could have put it in your</p> <p>14 report, but you chose not to; true?</p> <p>15 A. It was outside of the scope of my task.</p> <p>16 Q. Great.</p> <p>17 Anything else? Any other opinions that you</p> <p>18 intend on offering at trial that we -- have not been</p> <p>19 disclosed to me?</p> <p>20 A. Not that I can think of at the moment.</p> <p>21 Q. If you think of them, will you tell me</p> <p>22 today?</p> <p>23 A. I will.</p> <p>24 Q. Thank you.</p> <p>25 Any additional work that you intend on doing</p>	<p style="text-align: right;">Page 64</p> <p>1 others in the field of human factors?</p> <p>2 A. Not that I'm aware of.</p> <p>3 Q. Okay. And in this discussion of hindsight</p> <p>4 bias, when you do forensic work aren't you looking at</p> <p>5 an event that's already occurred, by definition?</p> <p>6 A. Well yes. By definition, yes.</p> <p>7 Q. And that's hindsight; isn't it, sir?</p> <p>8 A. Well --</p> <p>9 Q. "Yes" or "no"?</p> <p>10 A. Hindsight is different from hindsight bias.</p> <p>11 Q. Is that --</p> <p>12 Looking back at an event and trying to</p> <p>13 determine what happened is looking at an event in</p> <p>14 hindsight; true?</p> <p>15 A. I would not call it hindsight. I would call</p> <p>16 it analysis, analysis of past events --</p> <p>17 Q. I'm sure you wouldn't call it hindsight.</p> <p>18 A. -- and --</p> <p>19 Q. All right. Let's take a look, if we would,</p> <p>20 please --</p> <p>21 A. And I'm not done with --</p> <p>22 Q. Go ahead, answer.</p> <p>23 A. -- describing additional materials in my</p> <p>24 binder.</p> <p>25 Q. Yeah, please do.</p>

<p style="text-align: right;">Page 65</p> <p>1 A. I have an article, first author Lesch, 2 L-E-S-C-H, written in 2008 titled Visually Based 3 Perceptions of Slipperiness: Underlying Cues, 4 Consistency and Relationship to Coefficient of 5 Friction. 6 Q. Okay. 7 A. And those are the additional materials in 8 the binder. 9 Q. All right. Now a couple quick questions. 10 Well again, I'm not clear, is there 11 additional work you intend to do between now and the 12 time of trial that you know as of today you're going 13 to do? 14 A. Actually there is additional materials in my 15 binder that are not listed in the -- 16 Q. Okay. 17 A. -- in the report, that I recall. There 18 might be other materials provided to me by Mr. Moore's 19 office after I wrote the report. 20 So, for example, there's a Officer Toft who 21 was on the scene took a number of photographs and 22 video -- 23 Q. All right. 24 A. -- which I had not seen before I wrote the 25 report, but which I viewed since --</p>	<p style="text-align: right;">Page 67</p> <p>1 Q. And I can look at your binder and figure out 2 what those are. 3 A. Yes. 4 Q. All right. And those include some articles; 5 right? 6 A. Yes. 7 Q. And Officer Toft's photos and a video; 8 right? 9 A. That's correct. 10 Q. Now does your binder tell us when you 11 received Officer Toft's binder -- photos and videos? 12 A. No. 13 Q. Do you re -- 14 How do you receive materials from counsel; 15 is it by mail or email or what? 16 A. The Officer Toft videos and supplemental 17 narrative report and photographs were provided on a 18 DVD that was sent to me by the U.S. Postal Service. 19 Q. Do you keep a record of when it was received 20 by you? 21 A. I do not. 22 Q. Do you have any way of telling me when it 23 was sent to you, like maybe the letter, the 24 transmittal letter? 25 A. (Witness reviewing documents.) Oh, that's</p>
<p style="text-align: right;">Page 66</p> <p>1 Q. Okay. 2 A. -- that are referenced -- 3 Q. What else? 4 A. -- in my binder. 5 Also the deposition transcripts for Courtney 6 Jayne and Crissy Melendez -- 7 Q. Okay. 8 A. -- I reviewed. And -- 9 Q. You reviewed both of those? 10 A. Yes. 11 Q. All right. Let me ask you -- 12 A. And so there might be other materials. And 13 if there's any difference, it's readily apparent by 14 comparing the file contents in my binder with the -- 15 Q. Sure. 16 A. -- list of materials in my report. 17 Q. I understand. 18 My question though, is: Going forward from 19 today. Sitting here today are you aware of work that 20 you intend on doing between now and trial? 21 A. I am not. 22 Q. All right. Thank you. 23 You do have materials in your binder that 24 were not necessarily referenced in your report. True? 25 A. That's correct.</p>	<p style="text-align: right;">Page 68</p> <p>1 right, it was the -- June 14th was the date of the 2 letter that accompanied the DVD. 3 Q. And again, the date of your report? 4 A. June 29th. 5 Q. All right. 6 A. Oh. 7 Q. So you had those materials before you issued 8 your report; right? 9 A. Huh. Interesting. 10 Q. You had those materials before you issued 11 your report; right? 12 A. Well yes, according to this -- 13 Q. Okay. 14 A. -- letter. 15 Q. And you, for what -- 16 A. But that's not my recollection of -- 17 Q. -- for whatever reason -- 18 A. -- events. 19 Q. Okay. For whatever reason, they weren't 20 included. 21 And you -- you're telling me today you have 22 no way of telling me when you decided to put these 23 other pieces of literature you've referenced in the 24 binder. Is that accurate? 25 A. It would most likely be sometime in the last</p>

<p style="text-align: right;">Page 69</p> <p>1 couple of weeks.</p> <p>2 Q. Okay. Why in the last couple of weeks?</p> <p>3 A. That's when I began pulling my binder</p> <p>4 together and preparing for the deposition.</p> <p>5 Q. Got it. Okay.</p> <p>6 And other things that you referenced in</p> <p>7 terms of materials that are not in the report, one of</p> <p>8 which is the deposition of Crissy Melendez; correct?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. And you've reviewed that transcript.</p> <p>11 A. Yes.</p> <p>12 Q. When was it received by you?</p> <p>13 A. That was sent to me by email and, I don't</p> <p>14 know, maybe a week ago.</p> <p>15 Q. Okay. And you've reviewed the deposition of</p> <p>16 Courtney Jayne; is that correct?</p> <p>17 A. That's correct.</p> <p>18 Q. And when was that sent to you?</p> <p>19 A. Last night.</p> <p>20 Q. When did you review it?</p> <p>21 A. Last night.</p> <p>22 Q. Okay. All right. So if you would turn,</p> <p>23 please, to page 3 --</p> <p>24 Well wait a minute. Before we do that, stay</p> <p>25 on page 13 if you would, please. I want to ask you</p>	<p style="text-align: right;">Page 71</p> <p>1 A. Yes.</p> <p>2 Q. All right. And you know that to be the</p> <p>3 case.</p> <p>4 A. Yes.</p> <p>5 Q. All right. Define for me the term</p> <p>6 "supervise," as you use it, in number 5 of your</p> <p>7 opinion.</p> <p>8 A. Well in the context of the report, supervise</p> <p>9 would -- another name would be monitoring the</p> <p>10 activities of your young child to keep her away from</p> <p>11 hazards.</p> <p>12 Q. I --</p> <p>13 Is that a definition of supervise?</p> <p>14 A. Well supervise is broad. Supervise has to</p> <p>15 do with monitoring some event, it could be a person or</p> <p>16 it could be a -- you know, events that occur on a</p> <p>17 display of some type.</p> <p>18 Q. What --</p> <p>19 In the field of human factors, is there --</p> <p>20 is there an accepted definition of the term</p> <p>21 "supervision"?</p> <p>22 A. I would have to look it up and see if there</p> <p>23 is such a definition.</p> <p>24 Q. Did you do that before you issued your</p> <p>25 report?</p>
<p style="text-align: right;">Page 70</p> <p>1 something about category 10, the summary of your</p> <p>2 opinions; yes?</p> <p>3 A. Okay.</p> <p>4 Q. Okay? Define for me the term "hazard," as</p> <p>5 you use it in your opinions.</p> <p>6 A. A situation or a circumstance that presents</p> <p>7 the risk of injury.</p> <p>8 Q. Isn't it true that a hazard, as you have</p> <p>9 defined it, is a condition or set of circumstances</p> <p>10 that has the potential of causing or contributing to</p> <p>11 injury or death?</p> <p>12 A. That's what I wrote in my report, and it's</p> <p>13 pretty much what I just said, yes.</p> <p>14 Q. Okay. So it could be something that</p> <p>15 actually causes injury; right?</p> <p>16 A. Yes.</p> <p>17 Q. A set of circumstances. Or something that</p> <p>18 has the potential to cause it; correct?</p> <p>19 A. Yes.</p> <p>20 Q. All right. And it could be something, a set</p> <p>21 of circumstances that is a cause of an injury or</p> <p>22 contributes to an injury; --</p> <p>23 A. Yes.</p> <p>24 Q. -- correct?</p> <p>25 Those are two different things; correct?</p>	<p style="text-align: right;">Page 72</p> <p>1 A. Most likely I did not look it up because I</p> <p>2 understand how supervision has been used in human</p> <p>3 factors literature.</p> <p>4 Q. Okay. Is supervision a term of art in the</p> <p>5 field of human factors?</p> <p>6 A. I guess I don't know what "term of art"</p> <p>7 means. Is that a legal term, "term of art"?</p> <p>8 Q. You ever heard the word "ergonomics"?</p> <p>9 A. Yes.</p> <p>10 Q. Is that a term of art?</p> <p>11 A. I don't know what you mean by "term of art."</p> <p>12 Q. You don't know what the word -- the phrase</p> <p>13 "term of art" means.</p> <p>14 A. I don't --</p> <p>15 I don't know that that's a term used in</p> <p>16 human factors is "term of art."</p> <p>17 So I know what ergonomics mean, I know what</p> <p>18 human factors mean, I know what supervisory control in</p> <p>19 the field of human factors means.</p> <p>20 Q. Define the term "supervision," as you</p> <p>21 understand it.</p> <p>22 A. As I said, monitoring, you know, some event.</p> <p>23 Q. Define the term "monitoring," as you are</p> <p>24 using it.</p> <p>25 A. So supervision or monitoring is typically</p>

<p style="text-align: right;">Page 73</p> <p>1 using visual or auditory senses to detect some change</p> <p>2 in event that is of importance to the -- the person</p> <p>3 doing the observation. So the -- what could be</p> <p>4 important differs depending on the task.</p> <p>5 Q. You use the term "supervision" in a number</p> <p>6 of places in your report; true? Or a derivation of</p> <p>7 that term?</p> <p>8 A. I've not counted. I know there's a section</p> <p>9 on supervision of the child, and I don't know how many</p> <p>10 times. I'm assuming it's more than once.</p> <p>11 Q. Before you wrote your report did you do</p> <p>12 anything to determine what the law of the State of</p> <p>13 South Dakota utilizes for a definition of supervision?</p> <p>14 A. I did not.</p> <p>15 Q. In issuing your opinion are you trying to</p> <p>16 state the legal definition of the term "supervision"?</p> <p>17 A. I am not.</p> <p>18 Q. Are you trying to tell the jury that they</p> <p>19 should ignore the legal definition of supervision and</p> <p>20 employ whatever definition you decide to use?</p> <p>21 A. No, I think my report adequately describes</p> <p>22 what I mean by supervision and what type of</p> <p>23 supervision did or did not occur.</p> <p>24 Q. Would you agree that if there's a legal</p> <p>25 definition of the term supervision given to the jury</p>	<p style="text-align: right;">Page 75</p> <p>1 means, that's fine.</p> <p>2 So you're asking whether open and obvious is</p> <p>3 a term of art in human factors.</p> <p>4 Q. Does --</p> <p>5 Does the term "term of art" have a</p> <p>6 specialized meaning that's regularly employed or used</p> <p>7 by those in the human factors field?</p> <p>8 A. It is used in the warnings field, yes, for</p> <p>9 those who are -- do research and evaluate warnings</p> <p>10 often use the term "open and obvious."</p> <p>11 Q. And you also recognize that it is a legal</p> <p>12 term; yes?</p> <p>13 A. I do.</p> <p>14 Q. And you felt the need to explain what the</p> <p>15 term "open and obvious" meant in your report; correct?</p> <p>16 A. At one point I referenced -- said something</p> <p>17 about the hazard was readily apparent, and then added,</p> <p>18 in parentheses, "open and obvious," yes.</p> <p>19 Q. That's because the term "open and obvious"</p> <p>20 is not one that has a specialized meaning in the field</p> <p>21 of human factors, ergonomics or experimental</p> <p>22 psychology; true?</p> <p>23 A. No.</p> <p>24 Q. So --</p> <p>25 A. It's because I recognize that "open and</p>
<p style="text-align: right;">Page 74</p> <p>1 and it differs with your definition of the term</p> <p>2 supervision, the jury should be bound to follow the</p> <p>3 legal definition?</p> <p>4 MR. MOORE: Object to form.</p> <p>5 A. You know, that's a legal issue. All I can</p> <p>6 do is explain what I mean by supervision and how</p> <p>7 that's relevant in this particular case and my</p> <p>8 opinions in this case.</p> <p>9 Q. Okay. So in -- on page 13 of your report</p> <p>10 you used the term "open and obvious." See that?</p> <p>11 A. Yes.</p> <p>12 Q. You use that elsewhere in your report; true?</p> <p>13 A. Yes.</p> <p>14 Q. That is not a term that is commonly utilized</p> <p>15 in the literature related to the field of human</p> <p>16 factors or ergonomics; is it?</p> <p>17 A. Actually it is.</p> <p>18 Q. Is that a term of art in your field?</p> <p>19 A. Again you're asking me to respond to your</p> <p>20 phrase "term of art." I don't know what "term of art"</p> <p>21 means.</p> <p>22 Q. Would you agree that "term of art" means a</p> <p>23 term that has a specialized meaning in a particular</p> <p>24 field or profession, as defined by the dictionary?</p> <p>25 A. Well, if that's what you say "term of art"</p>	<p style="text-align: right;">Page 76</p> <p>1 obvious" is also a legal term, and wanted to describe,</p> <p>2 in some other way, that -- you know, what I intended</p> <p>3 and, you know, was -- was trying to avoid this type of</p> <p>4 conversation or challenge to the use of "open and</p> <p>5 obvious."</p> <p>6 Q. Did you choose the -- to use the term "open</p> <p>7 and obvious"; was it your idea?</p> <p>8 A. Yes.</p> <p>9 Q. And you were attempting to be respectful of</p> <p>10 the province of the Court; correct? And the role of</p> <p>11 the Court in this matter to instruct the jury on legal</p> <p>12 terms.</p> <p>13 A. No.</p> <p>14 Q. You were not. All right.</p> <p>15 A. No. My --</p> <p>16 Q. So --</p> <p>17 A. My point in writing reports, I never</p> <p>18 consider courts.</p> <p>19 Q. Or juries.</p> <p>20 A. Or juries. I try to understand --</p> <p>21 I try to write in a way that is</p> <p>22 understandable, you know, to describe my opinions in</p> <p>23 this case. And I understand that the judge and a jury</p> <p>24 may be an audience for the report, as well as</p> <p>25 attorneys on both sides of the issue, as well as other</p>

<p style="text-align: right;">Page 77</p> <p>1 experts. So there's different audiences for this 2 report. 3 Q. So when you write a report you don't -- 4 you're not concerned about whether or not anything you 5 say may impede upon the role of the judge; is that 6 right? 7 A. Yeah, that's true. I don't consider that. 8 I -- 9 Q. Or whether what you write may impede on the 10 role of the jury; right? 11 A. As I said, I'm interested in -- in 12 describing my opinions in a clear way that I think -- 13 Q. For an audience -- 14 A. -- should be helpful for many different 15 audiences. 16 Q. And you consider the jury an audience; is 17 that right? 18 A. I did, yes. 19 Q. Okay. So back to page 13. You reference 20 "canyon walls" and a "canyon"; right? In paragraphs 1 21 and 2 of section 10. "Yes"? 22 A. Well I don't see the word "walls" in here, I 23 see "rocky top of the canyon." 24 Q. No. Paragraph 10 on page 13 at number 1 25 says, 1 period, "the rocky edge of the canyon walls."</p>	<p style="text-align: right;">Page 79</p> <p>1 Q. Is there a single solitary witness in this 2 case, other than you, who has called this area a 3 canyon? 4 A. Not that I recall. 5 Q. Okay. Isn't it true that you picked the 6 term canyon in an attempt to be more persuasive about 7 your opinion? 8 A. No. I tried to be more descriptive. 9 Q. Isn't it true that -- 10 More descriptive. 11 A. Yes. 12 Q. Okay. Notwithstanding the fact that 13 numerous other people who live and work in Sioux 14 Falls, have never, ever, ever referred to this area as 15 a canyon. 16 A. I don't know if that's true or not. 17 Q. You've read every deposition in this case; 18 yes? 19 A. Well that's different from whether they've 20 ever referred to that as a canyon. 21 Q. Did any of -- any of the people who have 22 been deposed in this case refer to this area as a 23 canyon? 24 A. Not that I recall. 25 Q. Did any of the first responder reports</p>
<p style="text-align: right;">Page 78</p> <p>1 A. Oh, number 1. I see. 2 Q. Yeah. 3 A. Yes. 4 Q. Okay. Define the term "canyon" as you've 5 used it in your report. 6 A. It is the -- the channel in the earth that 7 was created by the river running through it. 8 Q. So any channel in the earth that contains a 9 water stream would be considered to have a canyon? 10 A. Well in this partic -- 11 I don't know about "any," but in this case 12 there was obvious rocky walls of some height that I 13 would -- I would consider it a canyon because of the 14 -- of the walls. 15 Q. You chose the term "canyon"? 16 A. I did. 17 Q. You chose the term "canyon" as opposed to a 18 term such as "drop-off"; true? 19 A. I don't know if I used the word drop-off in 20 the report; I may have. I don't recall. 21 Q. Isn't it true that virtually every witness 22 in this case, including the law enforcement and first 23 responders referred to the area where Maggie fell off 24 as a drop-off? 25 A. Well, that would be fine.</p>	<p style="text-align: right;">Page 80</p> <p>1 involving the 2013 drowning or the 2018 drowning refer 2 to it as a canyon? 3 A. Not that I recall. 4 Q. Do -- 5 Did any of the various documents, emails, 6 memorandum, et cetera, issued by the City of Sioux 7 Falls prior to Maggie's death, refer to this area as a 8 canyon? 9 A. Not that I recall. 10 Q. Did any of the City of Sioux Falls 11 documents, communications, emails, et cetera, issued 12 subsequent to Maggie's death refer to this area as a 13 canyon? 14 A. Not that I recall. The point of using that 15 term is I found that many of the terms used by others 16 involved in this case were not specific enough, 17 specifically when they talk about rocky ledges. After 18 visiting the site there are actually a number of rocky 19 ledges along the canyon wall, and it was not clear 20 from statements, descriptions of the incident, 21 statements of the -- or descriptions of the foam, 22 which rocky ledge was -- was obscured by the foam, and 23 I thought that was important to describe. 24 Q. And that's how you determined to use the 25 term canyon.</p>

<p style="text-align: right;">Page 81</p> <p>1 A. It is.</p> <p>2 Q. Have you been to the Grand Canyon in</p> <p>3 Arizona?</p> <p>4 A. I have.</p> <p>5 Q. Does it look similar to what you observed at</p> <p>6 Sioux Falls at Falls Park?</p> <p>7 A. Well, it does.</p> <p>8 Q. It does. Okay.</p> <p>9 A. It has rocky walls, and that's -- creates a</p> <p>10 -- is a space carved out by the river.</p> <p>11 Q. What's the difference between a canyon and a</p> <p>12 gorge?</p> <p>13 A. I do not know.</p> <p>14 Q. What's the difference between a canyon and a</p> <p>15 flume?</p> <p>16 A. I do not know.</p> <p>17 Q. What's the difference between a canyon and a</p> <p>18 gap?</p> <p>19 A. I do not know.</p> <p>20 Q. Or a ravine?</p> <p>21 A. Do not know.</p> <p>22 Q. What is the definition of a canyon?</p> <p>23 A. I was using it in the report, as I have</p> <p>24 said, to describe the rocky walls, you know, left by</p> <p>25 river carving out --</p>	<p style="text-align: right;">Page 83</p> <p>1 Q. Have any of your opinions changed, or been</p> <p>2 modified, amended or in any way different from the</p> <p>3 opinions set forth in your report since you authored</p> <p>4 it and signed it on June 29, 2019?</p> <p>5 A. Other than what we've discussed, no.</p> <p>6 Q. Otherwise you've not amended your opinions</p> <p>7 in any way; correct?</p> <p>8 A. Other than what we've discussed.</p> <p>9 Q. And you have, since authoring your report,</p> <p>10 had an opportunity to read the deposition transcripts</p> <p>11 of Courtney Melendez -- or excuse me, Crissy Melendez</p> <p>12 and Courtney Jayne; correct?</p> <p>13 A. Yes.</p> <p>14 Q. Both of whom were present at the incident</p> <p>15 site when Maggie went into the water; correct?</p> <p>16 A. That's correct.</p> <p>17 Q. You did not have the benefit of those</p> <p>18 transcripts when you issued your report; correct?</p> <p>19 A. That's correct.</p> <p>20 Q. Is it your testimony that nothing either of</p> <p>21 those two young mothers had to say altered or amended</p> <p>22 your opinions in any way?</p> <p>23 A. Well the -- the opinions, as outlined...</p> <p>24 So no. Those opinions as outlined in</p> <p>25 section 10 of my report have not been changed as a</p>
<p style="text-align: right;">Page 82</p> <p>1 Q. You deliberately --</p> <p>2 A. -- pieces of the earth at the bottom of the</p> <p>3 rocky walls.</p> <p>4 Q. Isn't it true you deliberately selected the</p> <p>5 term canyon in an attempt to persuade your audience</p> <p>6 that this was some massive drop-off akin to the Grand</p> <p>7 Canyon?</p> <p>8 A. No, that's not true.</p> <p>9 Q. Okay.</p> <p>10 A. As I said, it was an attempt to try to be</p> <p>11 more specific so I could talk about the top of the</p> <p>12 canyon walls.</p> <p>13 Q. I want to go through your report in detail.</p> <p>14 Let's start at page 1. The second paragraph of page 1</p> <p>15 of your report, which is Exhibit 2, by the way,</p> <p>16 identifies what your report is based upon. And you</p> <p>17 state it's based upon the facts of your personal</p> <p>18 knowledge, facts discerned from documents, expertise</p> <p>19 obtained over 28 years as an experimental psychologist</p> <p>20 and human factors engineers -- engineer, and the</p> <p>21 report and its opinions or conclusions are final to a</p> <p>22 reasonable degree of scientific certainty based on the</p> <p>23 examination of information provided to date.</p> <p>24 That date was June 29th, 2019; correct?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 84</p> <p>1 result of reading those two depositions transcripts.</p> <p>2 Q. Okay. On page 2 you state, quote: I have</p> <p>3 written numerous papers about the psychology and</p> <p>4 mechanics of human walking and falling.</p> <p>5 A. Which paragraph are you --</p> <p>6 Q. I'm sorry.</p> <p>7 A. -- talking about?</p> <p>8 Q. First paragraph. First full paragraph,</p> <p>9 second-to-the-last sentence.</p> <p>10 A. Okay.</p> <p>11 Q. Why did you include that sentence as it</p> <p>12 pertains to this case?</p> <p>13 A. Because one of the issues in this case has</p> <p>14 to do with Maggie falling into the river, and prior to</p> <p>15 that she would have walked or run into the river.</p> <p>16 Prior to that she may have tripped, she may have, you</p> <p>17 know, inadvertently stepped off onto -- in an area</p> <p>18 where there's no level of support, so there's an issue</p> <p>19 of gait and falling. I think later on I talk about</p> <p>20 the speed of walking and running of people of</p> <p>21 different ages, so it seemed pertinent to add that</p> <p>22 sentence to describe things that I might describe like</p> <p>23 -- to provide foundation for things I might describe</p> <p>24 later on in the report.</p> <p>25 Q. You just testified Maggie ran into the</p>

<p style="text-align: right;">Page 85</p> <p>1 river?</p> <p>2 A. No. I said she might have walked or run</p> <p>3 into the river.</p> <p>4 Q. You're speculating she might have run into</p> <p>5 the river.</p> <p>6 A. I think that's what Ms. Jayne said.</p> <p>7 Q. That she ran into the river?</p> <p>8 A. Ran into the -- what she thought was snow,</p> <p>9 yes, and that caused her to fall. That's my --</p> <p>10 Q. Who said that?</p> <p>11 A. Ms. Jayne.</p> <p>12 Q. Her mother?</p> <p>13 A. Yes.</p> <p>14 Q. Said that Maggie ran into the snow.</p> <p>15 A. That's what I recall, yes.</p> <p>16 Q. And you read that last night.</p> <p>17 A. Yes.</p> <p>18 Q. Okay. This notion that Maggie tripped and</p> <p>19 fell into the river is based on any -- on what facts?</p> <p>20 Identify for me every fact upon which you base a</p> <p>21 belief that she may have tripped and fell into the</p> <p>22 river.</p> <p>23 A. There are no facts available to describe the</p> <p>24 mechanism of fall. So, you know, any attempt to</p> <p>25 describe a mechanism of fall would be to evaluate what</p>	<p style="text-align: right;">Page 87</p> <p>1 The range -- The universe of possibilities</p> <p>2 that you believe explain the mechanism of her entering</p> <p>3 into the river are a trip and fall; right?</p> <p>4 A. Yes.</p> <p>5 Q. Or an air step. Is that right?</p> <p>6 A. Both of those are consistent with Jeremy's</p> <p>7 description of Maggie's trajectory prior to --</p> <p>8 Q. Okay.</p> <p>9 A. -- falling into the river.</p> <p>10 Q. And those are the mechanisms of her falling</p> <p>11 into the river that you think are consistent with what</p> <p>12 Jeremy has described.</p> <p>13 A. That's correct.</p> <p>14 Q. Any other mechanisms that you believe are</p> <p>15 consistent with what Jeremy has described?</p> <p>16 A. With Jeremy's description, it sounds --</p> <p>17 Q. Or any other facts.</p> <p>18 A. That's the only thing we have. None of the</p> <p>19 adults say that they, you know, saw or remember</p> <p>20 anything about Maggie falling, so we don't have any</p> <p>21 other information about the mechanism of fall. Jeremy</p> <p>22 is the only witness that we know of, and we have</p> <p>23 bruises on Maggie's legs. None of -- None of the</p> <p>24 bruises are informative in terms of the cause of the</p> <p>25 fall because those bruises could have happened fall --</p>
<p style="text-align: right;">Page 86</p> <p>1 are the possibilities given the descriptions of the</p> <p>2 fall provided by Jeremy Irlbeck, and --</p> <p>3 Q. Isn't it just as possible --</p> <p>4 A. If I could finish?</p> <p>5 Q. Sure.</p> <p>6 A. Jeremy Irlbeck told the police that Maggie</p> <p>7 was reaching toward the snow or foam and fell forward</p> <p>8 and eventually fell into the river. So that forward</p> <p>9 falling is consistent with two different mechanisms:</p> <p>10 One is a trip and fall, and the other is an air step,</p> <p>11 as I described earlier. There is the rocky, uneven</p> <p>12 surface at the top of the canyon walls are consistent</p> <p>13 -- well do present trip hazards and could cause</p> <p>14 someone to trip and fall forward. And when we trip,</p> <p>15 it's -- we -- typically, if not always, we fall</p> <p>16 forward from the point of the tripping obstacle and</p> <p>17 then the body falls forward. As opposed to a slip,</p> <p>18 which is typically a fall backwards.</p> <p>19 Q. Okay.</p> <p>20 A. So -- So the rocky uneven surface present a</p> <p>21 trip hazard. Maggie fell forward, that's consistent</p> <p>22 with a trip hazard. So it is possible that Maggie</p> <p>23 tripped and fell forward into the river.</p> <p>24 Q. All right. I just want to make sure I</p> <p>25 understand this. Okay?</p>	<p style="text-align: right;">Page 88</p> <p>1 you know, on the way down to the river, it could have</p> <p>2 happened as she's tumbled by the river, so we don't</p> <p>3 know how she got those bruises. So the only things we</p> <p>4 know is from Jeremy's account, and that is she was</p> <p>5 reaching forward, which implies that Maggie was</p> <p>6 standing and reaching forward, and she fell forward.</p> <p>7 Both of those things -- So then the mechanism of fall,</p> <p>8 given Jeremy's description, could be a trip and fall</p> <p>9 or it could be an air step.</p> <p>10 Q. Okay. Any other potential mechanisms of</p> <p>11 fall that you're prepared to tell the jury you believe</p> <p>12 are possible?</p> <p>13 A. Not that I can think of.</p> <p>14 Q. Okay. She wasn't pushed in; correct? To</p> <p>15 your knowledge.</p> <p>16 A. Not according to Jeremy.</p> <p>17 Q. Are you going to testify she was pushed in?</p> <p>18 A. No.</p> <p>19 Q. Okay. Are you going to testify she jumped</p> <p>20 in?</p> <p>21 A. Well the --</p> <p>22 Q. No, no.</p> <p>23 A. No.</p> <p>24 Q. Are you going to testify she jumped in?</p> <p>25 A. You know, if -- if the only information I</p>

<p style="text-align: right;">Page 89</p> <p>1 have is Jeremy's description, then jumping in is not</p> <p>2 consistent with Jeremy's description.</p> <p>3 Q. What you would say, based on Jeremy's</p> <p>4 description, is either a ghost or air step, using</p> <p>5 synonymous terms, or a trip and fall.</p> <p>6 A. That's correct.</p> <p>7 Q. Okay. You mentioned bruises on her;</p> <p>8 correct?</p> <p>9 A. Yes, there are bruises on her legs and a</p> <p>10 small laceration on her head.</p> <p>11 Q. When did you review the autopsy report?</p> <p>12 A. I think that was sent to me last couple</p> <p>13 weeks.</p> <p>14 Q. When did you review autopsy photos?</p> <p>15 A. Oh, autopsy photos.</p> <p>16 Q. Yes.</p> <p>17 A. Well I've not reviewed autopsy photos.</p> <p>18 Q. Okay.</p> <p>19 A. I reviewed photos of Maggie's body that</p> <p>20 Officer Tofte took, and I believe I had seen a few of</p> <p>21 those some time ago, and then it wasn't until recently</p> <p>22 that I reviewed the -- all of his photographs.</p> <p>23 Q. Was that after you issued your report that</p> <p>24 you did that?</p> <p>25 A. Reviewed all of the photographs?</p>	<p style="text-align: right;">Page 91</p> <p>1 A. That's correct.</p> <p>2 Q. You have no training in law enforcement;</p> <p>3 correct?</p> <p>4 A. That's correct.</p> <p>5 Q. Okay. All right. So I understand now why</p> <p>6 you included the sentence about psychology mechanics</p> <p>7 and human walking and falling. I'd like to -- for you</p> <p>8 to direct your attention, please, to number 2.</p> <p>9 A. Number 2?</p> <p>10 Q. Excuse me. Page 2. I'm sorry.</p> <p>11 In the first sentence of paragraph three you</p> <p>12 write experimental and human factors engineering. I</p> <p>13 just want to make sure I'm clear about something.</p> <p>14 Human factors is an engineering discipline; is it not?</p> <p>15 A. Well you can say human-factors psychology,</p> <p>16 you can say human-factors engineering, there -- there</p> <p>17 can be two different focuses. So, for example, the</p> <p>18 Board of Certification in Professional Ergonomics</p> <p>19 offers one exam that -- that one must pass in order to</p> <p>20 get certification as a human-factors professional, and</p> <p>21 -- but the certificate has a choice to be called a</p> <p>22 Certified Ergonomics Professional or a Certified Human</p> <p>23 Factors Professional, so...</p> <p>24 Q. Well which is it?</p> <p>25 A. And the -- the questions on that test, you</p>
<p style="text-align: right;">Page 90</p> <p>1 Q. Yeah.</p> <p>2 A. Yes.</p> <p>3 Q. And the autopsy report?</p> <p>4 A. Yes.</p> <p>5 Q. I asked you earlier to tell me everything</p> <p>6 you reviewed after you issued your report and you</p> <p>7 didn't tell me about those. Why is that?</p> <p>8 A. I did tell you about the Tofte DVD with</p> <p>9 videos and photographs.</p> <p>10 Q. But the autopsy report; was that on Tofte's</p> <p>11 DVD?</p> <p>12 A. Yeah. I forgot. No, it was not.</p> <p>13 Q. Okay. You forgot.</p> <p>14 A. I forgot to mention the coroner's report.</p> <p>15 Q. So you talked about bruises on her. I just</p> <p>16 want to make sure I understand this. Are you an</p> <p>17 expert in forensic pathology?</p> <p>18 A. I am not.</p> <p>19 Q. Do you have any medical training related to</p> <p>20 pathology?</p> <p>21 A. I do not.</p> <p>22 Q. Pathology, so it's clear for everybody on</p> <p>23 the jury, you're not a coroner; correct?</p> <p>24 A. That's correct.</p> <p>25 Q. Or a law enforcement detective; correct?</p>	<p style="text-align: right;">Page 92</p> <p>1 know, have to do with psychology as well as</p> <p>2 engineering, human-factors engineering and</p> <p>3 human-factors psychology issues.</p> <p>4 Q. So when you wrote human-factors engineering,</p> <p>5 did you mean human-factors engineering and/or possibly</p> <p>6 psychology?</p> <p>7 A. Since I already mentioned psychology when I</p> <p>8 wrote experimental psychology, I typically write the</p> <p>9 sentence in this way, "experimental psychology and</p> <p>10 human-factors engineering" to cover both bases.</p> <p>11 Q. And in the paragraph four on page 2 you</p> <p>12 write that you're expressing your opinions to a</p> <p>13 reasonable degree of scientific, technical, and human</p> <p>14 factors engineering certainty. See that?</p> <p>15 A. Yes.</p> <p>16 Q. You chose those words; correct?</p> <p>17 A. That's correct.</p> <p>18 Q. You go on to say, "and based on reliable and</p> <p>19 generally accepted scientific and human factors</p> <p>20 engineering techniques." See that?</p> <p>21 A. Yes.</p> <p>22 Q. You chose those words; correct?</p> <p>23 A. I did.</p> <p>24 Q. And at least in your instance you consider</p> <p>25 human factors to be an engineering discipline;</p>

<p style="text-align: right;">Page 93</p> <p>1 correct?</p> <p>2 A. It is both.</p> <p>3 Q. All right. Now turn, please, to --</p> <p>4 A. "Both," being engineering and psychology.</p> <p>5 Q. You didn't use the term "reasonable degree</p> <p>6 of human factors engineering and psychological</p> <p>7 techniques"; true?</p> <p>8 A. Well psychology is -- is subsumed under</p> <p>9 scientific.</p> <p>10 Q. Okay. And again you selected these terms,</p> <p>11 nobody else; right?</p> <p>12 A. That's correct.</p> <p>13 Q. To include.</p> <p>14 Turn to page 3, if you would, of your</p> <p>15 report. The -- The first -- Well section 3 on page 3</p> <p>16 starts, and it is a section on materials reviewed;</p> <p>17 correct?</p> <p>18 A. Yes.</p> <p>19 Q. Did you review what you wrote in section 3</p> <p>20 before you issued your report? In other words, did</p> <p>21 you review it to make sure it was accurate?</p> <p>22 A. I don't understand the question now.</p> <p>23 Q. Okay. You issued your report on June 29, if</p> <p>24 I remember correctly.</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 95</p> <p>1 materials you have reviewed?</p> <p>2 A. Because I reference them, and citing this is</p> <p>3 my opinion, this is how I think people behave, and</p> <p>4 this is research that supports my opinion in terms of</p> <p>5 how people behave, and then I list in section 3 the</p> <p>6 reference --</p> <p>7 Q. Great.</p> <p>8 A. -- from that citation.</p> <p>9 Q. Got it.</p> <p>10 Some may call that a recitation of some of</p> <p>11 the bases, the source materials for your opinions.</p> <p>12 A. Okay.</p> <p>13 Q. Do you have an issue with that, or no?</p> <p>14 A. No.</p> <p>15 Q. Okay. You also identify all the materials</p> <p>16 provided by defendant's counsel that you reviewed. Do</p> <p>17 you see that on page 3 --</p> <p>18 A. Yes.</p> <p>19 Q. -- of your report?</p> <p>20 And you list 25 items; correct?</p> <p>21 A. Yes.</p> <p>22 Q. Were there any materials provided to you by</p> <p>23 defendant's counsel that you reviewed and are not</p> <p>24 identified on page 3 of your report, other than what</p> <p>25 you've told me you reviewed recently?</p>
<p style="text-align: right;">Page 94</p> <p>1 Q. Before you sent it to counsel and issued it,</p> <p>2 did you proofread section 3, which relates to the</p> <p>3 materials you reviewed?</p> <p>4 A. Yes.</p> <p>5 Q. Okay.</p> <p>6 A. I included materials that I had received,</p> <p>7 and that I -- I had reviewed in some way, yes.</p> <p>8 Q. Okay. And you reviewed, for example, all of</p> <p>9 the research materials that you've identified on pages</p> <p>10 3 through 5; correct?</p> <p>11 A. Yes.</p> <p>12 Q. And all of those research materials that you</p> <p>13 have reviewed and identified on pages 3 to 5 of your</p> <p>14 report help form the bases of your opinion; correct?</p> <p>15 A. That's correct.</p> <p>16 Q. Okay.</p> <p>17 A. Well they -- they support my opinions in</p> <p>18 that I reached my opinions based on my understanding</p> <p>19 of human factors and experimental psychology and</p> <p>20 research on human information processing, and based on</p> <p>21 that experience I came to my opinions, and then I</p> <p>22 provided a list of materials that support those</p> <p>23 opinions.</p> <p>24 Q. Why, in your report, and in all of the</p> <p>25 reports you issue for litigation, do you identify the</p>	<p style="text-align: right;">Page 96</p> <p>1 A. Well not that I'm aware of.</p> <p>2 Q. Okay. And you reviewed each of these items</p> <p>3 identified at page 3 as being provided to you by</p> <p>4 defense counsel; correct?</p> <p>5 A. Numbers 1 through 25, yes.</p> <p>6 Q. Yes. And they helped form the bases of your</p> <p>7 opinions; correct?</p> <p>8 A. Yes, in that I evaluated the information</p> <p>9 provided and, you know, the -- coming to my opinions</p> <p>10 is an evolutionary process. So I start with reviewing</p> <p>11 some materials and generating hypotheses about what</p> <p>12 happened, and then those change. So, you know, if I</p> <p>13 review some material and that turns out not to be of</p> <p>14 interest, or relevant to my opinions, then I might</p> <p>15 have reviewed it, but it may not have provided any</p> <p>16 useful information for my opinions.</p> <p>17 Q. Which of the items identified in item --</p> <p>18 numbers 1 through 25, if any, did you review and find</p> <p>19 not useful?</p> <p>20 A. Well, for example, somewhere in number,</p> <p>21 maybe 4 and 5, the city's document production, or</p> <p>22 maybe number 9 -- 8 and 9, the supplemental and</p> <p>23 initial disclosures, there's information about the</p> <p>24 training that occurred in July and September of, must</p> <p>25 have been 2018 having to do with safety assessments.</p>

<p style="text-align: right;">Page 97</p> <p>1 At some point it was agreed upon between Mr. Moore and 2 myself that I would not address the risk-management 3 practices of the city, so then understanding how they 4 came about putting up the warnings and -- and -- and 5 doing some things and not others was no longer 6 relevant to my opinions for this report. So I 7 reviewed some of those materials about the training 8 and the risk-management practices and policies, but 9 they did not inform my opinions.</p> <p>10 Q. And you're not going to be offering opinions 11 on the training issues; correct?</p> <p>12 A. That's correct.</p> <p>13 Q. Or the risk-management activities, or 14 whatever we want to call it; correct?</p> <p>15 A. That's correct.</p> <p>16 Except as related to warnings, because the 17 warnings came out of the -- the risk-management 18 policies and the actions that they took subsequent to 19 the 2013 incident.</p> <p>20 Q. And you're not going to offer any opinions 21 on whether or not the city undertook an appropriate 22 hazard analysis before Maggie's drowning; correct? 23 You understand the term "hazard analysis"?</p> <p>24 A. I do.</p> <p>25 Q. Have you expressed an opinion on whether or</p>	<p style="text-align: right;">Page 99</p> <p>1 A. I recall reading that, yes.</p> <p>2 Q. Okay. I need to know if you're prepared to 3 testify -- if you're intending on testifying that 4 there was in fact a hazard analysis performed at Falls 5 Park prior to Maggie's death.</p> <p>6 A. No. I would not testify --</p> <p>7 Q. Okay.</p> <p>8 A. -- about that one way or the other.</p> <p>9 Q. Okay.</p> <p>10 A. I need to clarify, which is something I 11 tried to clarify earlier, I think was perhaps 12 interrupted. The --</p> <p>13 Q. You'll be --</p> <p>14 A. The warning signs that were created reflect 15 some level of hazard analyses. And so I want to make 16 sure you are not trying to preclude me from evaluating 17 the hazards presented in the warning signs and that 18 the city, you know, somehow failed to identify some 19 relevant hazards, because that's not something I 20 believe.</p> <p>21 Q. What I'm trying to do is find out what 22 you're going to testify to, and what gives you the 23 right as an expert to express your testimony. What I 24 intend to do with it should not be of your concern.</p> <p>25 So what I really need to know is whether or</p>
<p style="text-align: right;">Page 98</p> <p>1 not an appropriate hazard analysis was undertaken by 2 the city before Maggie's death?</p> <p>3 A. A part of hazard analyses has to do with not 4 only identifying hazards, but also identifying 5 possible solutions for mitigating those hazards, or 6 eliminating or mitigating those hazards --</p> <p>7 Q. Hazard analysis --</p> <p>8 A. -- and so --</p> <p>9 Q. Sorry.</p> <p>10 A. -- so since in my report I did discuss 11 issues of -- of fencing and warnings, you know, then 12 -- so I think the absence of fencing and the presence 13 of the warnings would be results of those hazard 14 analyses.</p> <p>15 Q. Hazard analysis is a very specific term; is 16 it not?</p> <p>17 A. Yes. Typically it has to do with 18 identification of hazards, and then there's another 19 step then often called something else that -- where 20 you generate solutions or, you know, possibilities for 21 how to eliminate or mitigate those hazards.</p> <p>22 Q. You're aware, are you not, that there has 23 been testimony by individuals who conducted the 24 training you've referred to that they did not provide 25 a full hazard analysis relative to Falls Park.</p>	<p style="text-align: right;">Page 100</p> <p>1 not you are going to testify that the City of Sioux 2 Falls conducted a hazard analysis relative to Falls 3 Park before Maggie Zaiger drowned.</p> <p>4 A. Well it's obvious that they conducted some 5 type of hazard analysis because they described hazards 6 and means to avoid those hazards in the warning sign. 7 So, you know, if you want me to say they didn't -- did 8 not do any hazard analyses, I cannot say that just 9 based on the evidence presented in the hazards 10 described in the warning sign. I think the city 11 clearly did some hazard analysis activity.</p> <p>12 Q. Are you going to testify to the adequacy of 13 the hazard analysis that you claim the city undertook, 14 and whether or not it met standard of care or not?</p> <p>15 A. If asked, you know, I would -- I would 16 testify I have the opinion that the warning sign 17 that's presented in the park sufficiently describes 18 the relevant hazards in this case.</p> <p>19 Q. I'm talking about the -- hazard analysis as 20 that term is routinely used in the risk management 21 field.</p> <p>22 A. There are a lot of different kinds of hazard 23 analysis, and in general, you know, it is either a 24 physical walk-through or a cognitive walk-through of a 25 task or environment to identify potential hazards in</p>

<p style="text-align: right;">Page 101</p> <p>1 that job or task or environment.</p> <p>2 Q. So with --</p> <p>3 A. So I don't -- I have not studied the types</p> <p>4 of hazard analyses, if any, that were performed by the</p> <p>5 city, and it is obvious that they performed some type</p> <p>6 of analyses because the warning signs indicate a</p> <p>7 sufficient and adequate description of hazards at</p> <p>8 least that are relevant to this case.</p> <p>9 Q. Are you going to offer an opinion as to</p> <p>10 whether or not the City of Sioux Falls conducted a</p> <p>11 risk management audit prior to Maggie -- at any point</p> <p>12 in time prior to Maggie's death?</p> <p>13 A. I don't even know what "risk management</p> <p>14 audit" means, so I will not say anything specifically</p> <p>15 about risk management audit.</p> <p>16 Q. Do you intend on opining on the adequacy of</p> <p>17 any hazard analysis that you claim the City of Sioux</p> <p>18 Falls undertook prior to Maggie's death in 2018?</p> <p>19 A. As I said, it was sufficient enough to</p> <p>20 describe the hazards that are relevant in this</p> <p>21 situation. Whether they performed a hazard analyses</p> <p>22 that was adequate for all of the hazards in the park,</p> <p>23 I don't know. That's not something that I would</p> <p>24 provide an opinion about.</p> <p>25 Q. All right. So I want to go back to your</p>	<p style="text-align: right;">Page 103</p> <p>1 comes before me. So I don't evaluate credibility</p> <p>2 issues. You know, I just don't think about</p> <p>3 credibility. I evaluate the -- the amount of</p> <p>4 information, you know, that's in evidence.</p> <p>5 Q. Any other documents in 1 through 25 that you</p> <p>6 deemed irrelevant to your analyses?</p> <p>7 A. I think, for example, the deposition of Ben</p> <p>8 Statema, I believe that was solely related to the 2013</p> <p>9 incident. I might have skimmed those things, but I</p> <p>10 have not put much weight on anything involving the</p> <p>11 2013 incident.</p> <p>12 Q. Why is that?</p> <p>13 A. I don't see that it is relevant to this</p> <p>14 particular incident.</p> <p>15 Q. Why?</p> <p>16 A. Because the fall that occurred, you know, on</p> <p>17 the -- on the face of it, you know, that particular</p> <p>18 incident involved a young child that was reported to</p> <p>19 be interacting with the foam in some way and ended up</p> <p>20 falling, and those -- and that incident is paired with</p> <p>21 the 20 -- 2018 incident because of the similarities,</p> <p>22 it's a young child and -- and they're interacting with</p> <p>23 foam. But in evaluating what type of warnings should</p> <p>24 have been placed, if at any evaluating the hazards in</p> <p>25 the subject situation, what we have to do is look at</p>
<p style="text-align: right;">Page 102</p> <p>1 report, if I could. Okay?</p> <p>2 And I understand that you did not find the</p> <p>3 initial disclosure of the city and the supplemental</p> <p>4 initial disclosure relevant to what you were doing as</p> <p>5 those disclosures involved training issues and</p> <p>6 risk-management issues.</p> <p>7 A. I don't recall what documents were included</p> <p>8 as part of those initial disclosures. If all of them</p> <p>9 had to do with training, then yes, I would agree with</p> <p>10 your question that I would not provide any opinions</p> <p>11 about that. But I think there were other documents</p> <p>12 provided in those initial disclosures that I did use,</p> <p>13 --</p> <p>14 Q. I'm trying to find --</p> <p>15 A. -- such as the --</p> <p>16 Q. I'm sorry.</p> <p>17 A. -- such as the police report I believe was</p> <p>18 in part of the initial disclosure, and the police</p> <p>19 photographs, and those certainly provide information</p> <p>20 that I used in forming my opinions.</p> <p>21 Q. Did you judge the credibility of the police</p> <p>22 reports in reaching your opinions?</p> <p>23 A. Yeah, I have trouble with your use of</p> <p>24 "credibility," that -- that just doesn't enter into my</p> <p>25 thought processes in -- in evaluating information that</p>	<p style="text-align: right;">Page 104</p> <p>1 all of the deaths and the rescue attempts that happen</p> <p>2 along the river in the last, you know, X number of</p> <p>3 years and then evaluate what should be done, well one,</p> <p>4 to identify -- what hazards are -- can be identified</p> <p>5 based on these incidents, and what can be done to</p> <p>6 attempt to prevent those incidents in the future.</p> <p>7 So the 2013 incident is one of 42, if I</p> <p>8 remember, between 1980 and 2018, and -- and it's just</p> <p>9 one out of those 42. There are many other deaths and</p> <p>10 rescue attempts that also need to be considered.</p> <p>11 Q. In 2013 a young child went into the water;</p> <p>12 correct?</p> <p>13 A. Yes.</p> <p>14 Q. And subsequently two individuals who</p> <p>15 attempted to rescue that young child got into the</p> <p>16 water and ultimately drowned; correct?</p> <p>17 A. That's correct.</p> <p>18 Q. The precipitating event of those two people</p> <p>19 getting into the water and drowning was the young</p> <p>20 child who fell into the water; correct?</p> <p>21 A. Yes.</p> <p>22 Q. The young child fell into the water in</p> <p>23 approximately the same area as it's reported that</p> <p>24 Maggie Zaiger fell into the water; correct?</p> <p>25 A. That's my understanding, yes.</p>

<p style="text-align: right;">Page 105</p> <p>1 Q. That's correct; isn't it, according to the</p> <p>2 reports?</p> <p>3 A. That's my understanding based on those</p> <p>4 reports, yes.</p> <p>5 Q. Okay. Thank you.</p> <p>6 And the incident in 2013 is reported to have</p> <p>7 occurred when the young child was interacting with</p> <p>8 foam in the -- in the river; correct?</p> <p>9 A. Yes.</p> <p>10 Q. Maggie Zaiger was re -- is reported to have</p> <p>11 fallen into the river while interacting with foam;</p> <p>12 correct?</p> <p>13 A. Yes.</p> <p>14 Q. Okay.</p> <p>15 A. By Jeremy, but not by --</p> <p>16 Q. I didn't ask you by --</p> <p>17 A. -- not by the two adults. So there is</p> <p>18 conflicting reports about what Maggie was doing. You</p> <p>19 know, the two adults don't know, you know. So if we</p> <p>20 are just looking at Jeremy's statement, then yes, she</p> <p>21 was reaching for the foam.</p> <p>22 Q. And Jeremy was there; correct?</p> <p>23 A. Yes.</p> <p>24 Q. So Jeremy's statement about what happened</p> <p>25 ought be given credibility by you; shouldn't it?</p>	<p style="text-align: right;">Page 107</p> <p>1 unaware that the river was below the unseen ledge from</p> <p>2 which he fell; correct?</p> <p>3 A. That I don't recall.</p> <p>4 Q. Okay. And it's reported that Maggie was</p> <p>5 unaware of the river below the unseen ledge where she</p> <p>6 fell; correct?</p> <p>7 A. Well --</p> <p>8 Q. Is that correct?</p> <p>9 A. Well I don't know that that's correct.</p> <p>10 Q. Okay. So in 2013 we have a young child</p> <p>11 interacting with the foam in approximately the same</p> <p>12 area as Maggie Zaiger who falls off an unseen ledge</p> <p>13 during a transient period of high foam, into the</p> <p>14 river; correct?</p> <p>15 A. Yes.</p> <p>16 Q. In 2018 Maggie Zaiger, who is a young child,</p> <p>17 is interacting with the foam in the same area as the</p> <p>18 child who fell in off the ledge in 2013, and she falls</p> <p>19 off into the river off an unseen ledge during a high</p> <p>20 foam period of time; correct?</p> <p>21 A. Yes.</p> <p>22 Q. The drowned --</p> <p>23 The young child going into the water in 2013</p> <p>24 which resulted in the deaths of two people is</p> <p>25 substantially similar in how it occurred to the death</p>
<p style="text-align: right;">Page 106</p> <p>1 A. And I have.</p> <p>2 Q. Okay. And Jeremy reports that both he and</p> <p>3 Maggie were there to interact with the foam; correct?</p> <p>4 A. That's correct.</p> <p>5 Q. All right. The same thing that the young</p> <p>6 child was doing in 2013; correct?</p> <p>7 A. That's correct.</p> <p>8 Q. All right. And the young child in 2013 is</p> <p>9 reported to have fallen off an unseen ledge into the</p> <p>10 river; correct?</p> <p>11 A. That's what I've read, yes.</p> <p>12 Q. And it's reported that Maggie Zaiger fell</p> <p>13 off an unseen ledge into the river; correct?</p> <p>14 A. Yes.</p> <p>15 Q. Okay. And the young child in 2013 went into</p> <p>16 the river during a period of high foam, or large foam</p> <p>17 buildup; correct?</p> <p>18 A. That's correct.</p> <p>19 Q. An event that does not take place 365 days</p> <p>20 of the year in Falls Park; correct?</p> <p>21 A. That's correct.</p> <p>22 Q. The foam buildup occurs during very</p> <p>23 discrete, specific times of the year; correct?</p> <p>24 A. That's my understanding.</p> <p>25 Q. And it's reported that the young boy was</p>	<p style="text-align: right;">Page 108</p> <p>1 of Maggie Zaiger in 2018; correct?</p> <p>2 A. I think as you've described, yes, there are</p> <p>3 --</p> <p>4 Q. Okay.</p> <p>5 A. -- substantial similarities.</p> <p>6 Q. And you had the benefit of all the</p> <p>7 information that you requested or needed to review to</p> <p>8 understand what people believed happened in 2013 as of</p> <p>9 the time you issued your report; correct?</p> <p>10 A. Well I -- as I said, I reviewed the</p> <p>11 materials listed in my report.</p> <p>12 Q. And that included a plethora of information</p> <p>13 about what happened in 2013; correct?</p> <p>14 A. That's correct.</p> <p>15 Q. And you had all the information that you</p> <p>16 needed or required or asked for as of -- about Maggie</p> <p>17 Zaiger's death at the time you issued your report,</p> <p>18 other than the deposition transcripts of the two</p> <p>19 mothers who were there; correct?</p> <p>20 A. I'm sorry. Ask that again.</p> <p>21 Q. You had everything you needed to know about</p> <p>22 what happened to Maggie Zaiger when you issued your</p> <p>23 report, other than the two deposition transcripts.</p> <p>24 A. I don't know if it's everything I needed.</p> <p>25 It's -- It's everything I had.</p>

<p style="text-align: right;">Page 109</p> <p>1 Q. And everything you had asked for?</p> <p>2 A. I don't know that there's any other material</p> <p>3 out there, yes.</p> <p>4 Q. Everything you had asked for; correct?</p> <p>5 A. I mean there -- it would be nice to have</p> <p>6 video of that incident but, you know, I work with the</p> <p>7 materials that are available.</p> <p>8 Q. Isn't it true that the foam can hide</p> <p>9 portions of the Falls rocks formations?</p> <p>10 A. Portions, yes.</p> <p>11 Q. Isn't it true that the foam can create an</p> <p>12 attraction for visitors?</p> <p>13 A. I have not seen any evidence of that.</p> <p>14 Q. Isn't it true that the foam can draw</p> <p>15 visitors even closer to the water?</p> <p>16 A. Well you have these two incidents, the 2013</p> <p>17 and the 2018. We know that Jeremy and the two girls</p> <p>18 -- the three girls, including Maggie, appeared to be</p> <p>19 there to look at the snow/foam, so that would indicate</p> <p>20 that at least these four children and Garrett in the</p> <p>21 2013 incident were interested in the foam. As a</p> <p>22 general blanket statement I don't know that you can</p> <p>23 say that it -- in general it acts as an attractant.</p> <p>24 Q. Isn't that what the City of Sioux Falls</p> <p>25 believes, that the foam can create an attraction for</p>	<p style="text-align: right;">Page 111</p> <p>1 A. Yeah, I would have to look at the rest of</p> <p>2 that transcript before I can -- because, you know --</p> <p>3 Q. Here's what I --</p> <p>4 A. -- you're cherry-picking there for the</p> <p>5 testimony.</p> <p>6 My recollection that most of these staff did</p> <p>7 not agree with the ques -- or with the statement that</p> <p>8 the foam was a hazard, and did not agree with the</p> <p>9 statement that the city recognized the foam as a</p> <p>10 hazard after the 2013 incident, but started looking at</p> <p>11 it more thoroughly, I guess, or taking it more</p> <p>12 seriously as a hazard after the 2018 incident.</p> <p>13 Q. Isn't it true Mr. Kearney testified under</p> <p>14 oath and subject to the penalty of perjury, that the</p> <p>15 foam was a factor in both the 2013 and 2018 drownings?</p> <p>16 A. Yeah. Again I would have to review the</p> <p>17 transcript, not just that page.</p> <p>18 Q. Wouldn't it be for the jury to make a</p> <p>19 determination as to the accuracy of his testimony as</p> <p>20 opposed to you?</p> <p>21 A. I'm not -- I'm -- I'm expressing concern</p> <p>22 about the accuracy of his testimony given the absence</p> <p>23 of context.</p> <p>24 Q. Please direct your attention to paragraph --</p> <p>25 or page 30 of Mr. Kearney's deposition transcript.</p>
<p style="text-align: right;">Page 110</p> <p>1 visitors?</p> <p>2 A. I think they -- from my reading of the</p> <p>3 deposition transcripts after the 2018 incident they</p> <p>4 started looking at foam as a hazard, but not after the</p> <p>5 2013 incident.</p> <p>6 Q. Isn't it true, sir, that the foam was</p> <p>7 identified as a hazard following the 2013 drownings?</p> <p>8 A. I think it was identified as an issue,</p> <p>9 something to evaluate, but my recollection of</p> <p>10 deposition transcripts from Mike Hall, for example,</p> <p>11 Kelby Mieras, you know, they both disagreed that they</p> <p>12 understood the foam to be a --</p> <p>13 Q. Do you know who --</p> <p>14 A. -- a hazard after the 2013 incident.</p> <p>15 Q. Do you know who Don Kearney is?</p> <p>16 A. Yes.</p> <p>17 Q. Don Kearney is employed by the City of Sioux</p> <p>18 Falls?</p> <p>19 A. Yes.</p> <p>20 Q. He's the park director?</p> <p>21 A. Yes.</p> <p>22 Q. Isn't it true that he was asked, quote, was</p> <p>23 the fact that there was an unseen ledge a hazard, an</p> <p>24 identified hazard in the 2013 drownings? His answer,</p> <p>25 under oath: Yes.</p>	<p style="text-align: right;">Page 112</p> <p>1 A. (Witness reviewing document.)</p> <p>2 Q. You have my only copy. I will direct you to</p> <p>3 the line that I need you to read if you could return</p> <p>4 it to me?</p> <p>5 A. I'm going to read the other pages as well.</p> <p>6 Page 29 he said: The city knew about this</p> <p>7 hazard in 2013. Oh, no. You asked: The city knew</p> <p>8 about this hazard in 2013 because of the incident in</p> <p>9 2013; true? Answer: We didn't identify it as a</p> <p>10 hazard.</p> <p>11 So that's -- that's of course what I've said</p> <p>12 about my recollection of his --</p> <p>13 Q. Sure.</p> <p>14 A. -- testimony as well as the other staff,</p> <p>15 most of the other staff about the -- recognizing the</p> <p>16 foam as a hazard in twenty thir -- after the 2013</p> <p>17 incident versus the 2018 incident.</p> <p>18 Q. Please read page 30, line 15 through 17 of</p> <p>19 Mr. Kearney's under oath testimony, sir, and only</p> <p>20 those lines.</p> <p>21 A. Well again you're asking me to --</p> <p>22 Q. I just --</p> <p>23 A. -- evaluate something out of context.</p> <p>24 Q. I'm not asking you to evaluate something,</p> <p>25 I'm asking you to read something.</p>

<p style="text-align: right;">Page 113</p> <p>1 A. What do you want me to read?</p> <p>2 Q. I -- Paragra --</p> <p>3 Page 30, line 15 through 17.</p> <p>4 A. Well again it's the same issue. Yes, he</p> <p>5 said he --</p> <p>6 Q. No, no.</p> <p>7 A. -- now he believes it's a factor in both</p> <p>8 incidents. But after the 2013 incident and before the</p> <p>9 2018 incident the city had not identified the foam as</p> <p>10 a hazard.</p> <p>11 Q. Again I'm going to ask you to follow my</p> <p>12 question, please, and read for the trans -- for the</p> <p>13 record and the jury, page 30, line 15 through 17 of</p> <p>14 Mr. Kearney's under oath testimony.</p> <p>15 A. Page 30, line 15: And foam was a factor in</p> <p>16 both of those drownings, the 2018 and 2013 drowning;</p> <p>17 true? Answer: Yes.</p> <p>18 Why didn't the city identify the fact that</p> <p>19 this foam builds up so large that it creates an unseen</p> <p>20 ledge leading to a fall into a river? When we</p> <p>21 reviewed the incident, we didn't identify that as a</p> <p>22 hazard.</p> <p>23 MR. SIEFF: Okay. I'm going to move to</p> <p>24 strike that answer, and once again I'd ask you to</p> <p>25 simply read page 13, line 15 to 17.</p>	<p style="text-align: right;">Page 115</p> <p>1 So I'm advocating for science, not the</p> <p>2 city's position.</p> <p>3 Line 15: And foam was a factor in both of</p> <p>4 those drownings, the 2018 and 2013 drowning, true?</p> <p>5 Answer: Yes.</p> <p>6 Q. Thank you.</p> <p>7 THE WITNESS: Can we take a break?</p> <p>8 MR. SIEFF: Yes, of course.</p> <p>9 THE REPORTER: Off the record, please.</p> <p>10 (Recess taken from 11:47 a.m. to</p> <p>11 12:28 p.m.)</p> <p>12 BY MR. SIEFF:</p> <p>13 Q. Doctor, turning your attention to page 6 of</p> <p>14 Exhibit 2, which is your report, I'd like to direct</p> <p>15 your attention, please, to your statement that you --</p> <p>16 Generally speaking would you agree that</p> <p>17 you've looked at an analysis of the descriptions of 42</p> <p>18 drownings and rescues since 1980 provided by the Sioux</p> <p>19 Falls Argus?</p> <p>20 A. I'm sorry.</p> <p>21 Q. Sure. Let me rephrase it.</p> <p>22 We're going to take a look starting at page</p> <p>23 6 under the heading DESCRIPTION OF HAZARD. In the</p> <p>24 first paragraph you are describing an analysis you</p> <p>25 conducted of 42 -- descriptions of 42 drownings and</p>
<p style="text-align: right;">Page 114</p> <p>1 A. Okay. So you're asking me to take that</p> <p>2 answer out of context to the rest of his answers.</p> <p>3 Q. I'm asking you to not be an advocate and</p> <p>4 determine for the jury which parts of testimony they</p> <p>5 should find credible and which ones they should not.</p> <p>6 I'm simply asking you to read into the</p> <p>7 transcript what Mr. Kearney testified to under oath.</p> <p>8 A. I'm not being an advocate for the city's</p> <p>9 position, I'm being an advocate for witness statements</p> <p>10 about what was perceived as a hazard and not perceived</p> <p>11 as a hazard at a certain point in time.</p> <p>12 So my -- my concern here is you're asking me</p> <p>13 to read -- you know, cherry-pick discussions that --</p> <p>14 out of context, which -- which would mislead the jury</p> <p>15 as to what Mr. Kearney actually said.</p> <p>16 Q. It would be Mr. Moore's job to object to</p> <p>17 something I'm misleading, not yours, sir.</p> <p>18 Please read page 30, line 15 to 17.</p> <p>19 A. And I need to respond that as the scientist</p> <p>20 here and discussing my opinions and the bases for my</p> <p>21 opinions, the bases for my opinions are the statements</p> <p>22 from -- from city staff and first responders, and --</p> <p>23 and, for example, has lead me to believe that -- that</p> <p>24 foam was not a hazard, and so this -- this very much</p> <p>25 goes to the opinions that I've provided.</p>	<p style="text-align: right;">Page 116</p> <p>1 rescues since 1980 at Falls Park provided in the local</p> <p>2 newspaper. Is that a fair statement?</p> <p>3 A. Yes.</p> <p>4 Q. And you go on to describe, or -- your</p> <p>5 analysis of those drownings. Is that a fair</p> <p>6 statement?</p> <p>7 A. Yes.</p> <p>8 Q. All right. And you conclude, towards the</p> <p>9 end of that paragraph, that, quote, analyses of these</p> <p>10 42 incidents indicate that 69% resulted from visitors</p> <p>11 playing in the water or falling into the water; the</p> <p>12 rest involved rescuers or were of an unknown cause,</p> <p>13 end quote.</p> <p>14 Correct?</p> <p>15 A. Yes.</p> <p>16 Q. All right. The 69 percent figure you came</p> <p>17 up with, does that include instances where rescuers</p> <p>18 were involved in an attempt to rescue a visitor who</p> <p>19 was playing in the water or who fell into the water?</p> <p>20 A. No. The phrase after the first phrase in</p> <p>21 that sentence mentioning 69 percent, says "the rest</p> <p>22 involved rescuers or were of unknown cause." So</p> <p>23 rescuers, including the two rescuers in the 2013</p> <p>24 incident, would be part of the 31 percent.</p> <p>25 Q. Okay. Thank you for clarifying that.</p>

<p style="text-align: right;">Page 117</p> <p>1 In the last sentence you state, quote, the 2 presence of foam did not appear to be a causal factor 3 in most of the drowning and rescue incidents, period, 4 end quote. 5 I read that correctly; yes? 6 A. Yes. 7 Q. All right. When you use the term "causal 8 factor," what do you mean? 9 A. Most incidents, if not all of them, are a 10 result of multiple factors or multiple things that 11 occurred that lead to that injury incident. So those 12 events or processes that helped cause an injury or a 13 fatality would be a causal factor. 14 Q. What do you mean by "causal factor"? 15 A. As I just said, you know, an event or 16 process that -- that could be responsible for 17 resulting in an injury or death. 18 Q. In using the term "causal factor" when you 19 analyzed the various 42 drownings, did you determine, 20 of those 42 drownings, in how many instances the 21 presence of foam appeared to be a substantial factor 22 in bringing about either the drowning and/or rescue 23 incident? 24 A. I think I indicated -- 25 Well at least for the newspaper article only</p>	<p style="text-align: right;">Page 119</p> <p>1 Q. How many -- You would acknowledge that 2 drowning -- Excuse me. 3 You would acknowledge the presence of foam 4 was a substantial factor in bringing about the 5 drownings -- in bringing about two drowning and rescue 6 incidents. 7 A. No. I just -- You know, as I phrased it in 8 this paragraph, the newspaper article only mentioned 9 foam in one event. Obviously there was mention of 10 foam in the 2018 event as well, but not mentioned in 11 the newspaper article. The fact that foam has been 12 identified as a hazard, I think as -- well as I've 13 said in my report, I don't believe that it is a 14 hazard. In reading the descriptions and changes of 15 concept of the foam as a hazard after the 2018 16 incident, I wonder whether a illusory truth effect is 17 at play here. You know foam is sort of brought up a 18 number of times, it's a very salient characteristics 19 of two different incidents and, you know, perhaps 20 repeating; oh, foam is a hazard, foam is a hazard, 21 foam is a hazard, makes people think that perhaps foam 22 is a hazard without really doing the analyses of -- 23 of, like, such as this. You know, well let's look at, 24 you know, the actual circumstances of each of these 25 events and see whether foam was a critical feature.</p>
<p style="text-align: right;">Page 118</p> <p>1 mentioned foam in an event description one time. Now 2 we have two out of those -- I believe the -- Maggie's 3 fall was included in the 42 incidents. Yeah. So -- 4 Well, I believe it was. Which means you have two out 5 of the 42 that seem to have some factor such as foam. 6 You know, another factor that -- that could be looked 7 at is age of the person who went in, which I did not 8 discuss here because age wasn't described -- the age 9 of the person injured or drowned or rescued wasn't 10 described in the newspaper article. But I think I 11 remember reading something else that something like 50 12 percent of the deaths were of young children under the 13 age of 12, if I remember correctly. 14 Q. So when you say -- 15 A. And so age, you know, could be considered 16 another factor, or. 17 Q. When you say the presence of foam did not 18 appear to be a causal factor in most of the drowning 19 and rescue incidents, by -- the converse of that would 20 be the presence of foam appeared to be a causal factor 21 in some of the drowning and rescue incidents; true? 22 A. A small percentage, 2 out of 42, so. 23 Q. Some. 24 A. Yeah. "Some" is vague, but -- and I guess 25 that was most.</p>	<p style="text-align: right;">Page 120</p> <p>1 As I said in my -- So -- So no, I would not agree with 2 the statement that, you know, foam is a hazard, or -- 3 or really was a causal factor in any of these 4 incidents. 5 Q. So when you state, "the presence of foam did 6 not appear a causal factor in most of the drowning and 7 rescue incidents," which are the words you wrote, -- 8 A. Yes. 9 Q. -- what you really meant to say was the 10 presence of foam did not appear to be a causal factor 11 in any of the drowning and rescue incidents; is that 12 right? 13 A. Well, yes. I'm describing, you know, the 14 incidents as -- as described in the newspaper article. 15 Q. When you wrote -- 16 A. And so -- where they're mentioning foam 17 related to the 2013 incident. So that sentence -- you 18 know, and in looking at the, you know, sort of the 19 description of events provided in the newspaper talk 20 about things like falling into the river, or canoeing 21 on the river, you know, afraid to -- you know, they 22 got to the rock island and was afraid to come back, so 23 those are various descriptions of some of the 24 incidents described in the newspaper article. So -- 25 So this last sentence, "presence of foam did not</p>

<p style="text-align: right;">Page 121</p> <p>1 appear to be a causal factor," is rele -- is as 2 related to the description provided by the newspaper. 3 Q. Well what you wrote exactly was: "The 4 presence of foam did not appear to be a causal factor 5 in most of the drowning and rescue incidents." 6 A. As described by the newspaper. 7 Q. Okay. When you say "in most of the drowning 8 and rescue incidents," what you're really saying is in 9 none of the drowning and rescue incidents; is that 10 correct? 11 A. Well as I said, as described by the 12 newspaper. The newspaper only talks about foam as 13 somehow being related to a fall. 14 Q. But -- 15 A. So in the newspaper accounts there is one 16 out of the 42. So saying that -- and foam might be 17 considered a causal factor in that 2013 incident as 18 described in the newspaper. So there's still one out 19 of the 42 that seems to be somehow related to foam. 20 So then the presence of foam did not appear to be a 21 causal factor in most of the drowning and rescue 22 incidents is correct, because 41 out of the 42 did not 23 appear to be related to foam. Forty-one out of 42 24 would clearly be most -- 25 Q. Okay.</p>	<p style="text-align: right;">Page 123</p> <p>1 foam did not appear to be a causal factor in most of 2 the drowning and rescue incidents. 3 A. Yes. And as I said, this is -- this is not 4 intended to be a thorough analysis, but this is the 5 data that is available to me at the time and is more 6 thorough and complete than any analyses that Ms. Gill 7 appeared to have conducted. 8 Q. Is it intended to be something you relied 9 upon in reaching your opinions in this case? 10 A. I'm sorry, which is? 11 Q. Is this analyses you conducted, which you 12 acknowledge is not thorough, something that you relied 13 upon in reaching your opinions in this case? 14 A. Yes. 15 Q. Is it something that you would expect the 16 jury to rely upon in reaching their decision about 17 this case? 18 A. I think I have said before, I'm -- I'm -- I 19 am presenting information from a human factors 20 perspective to the jury. What they do with that is -- 21 is up to them, so I have no expectation one or the 22 other. I present the information as best I can. 23 Q. And based upon your less -- this 24 less-than-thorough analyses you conducted, you did 25 conclude that the presence of foam appeared to be a</p>
<p style="text-align: right;">Page 122</p> <p>1 A. -- and not all. 2 Q. In par -- 3 In the first paragraph of Section 7 you 4 conducted an analyses of the reports of previous 5 accidents and near-miss accidents, in this case 6 drownings or near drownings; right? 7 A. Yes. 8 Q. And you utilized a newspaper report from the 9 Sioux Falls Argus; correct? 10 A. I think it's called the Argus Leader, but 11 yes. 12 Q. Okay. And you considered utilizing the 13 Argus Leader to conduct a hazard analysis to be 14 scientifically valid, is that correct, for a hazard 15 analysis? 16 A. Yes. It's the same way that other -- 17 Q. Okay. 18 A. -- hazard analyses are performed in 19 companies, say, or industry, where you would look at 20 reports of incidents that had occurred in a certain 21 timeframe. And so those reports provide the data for 22 the hazard analyses. 23 Q. And based on your scientific analyses of the 24 reports of drownings and near drownings as derived 25 from the Argus Leader, you concluded the presence of</p>	<p style="text-align: right;">Page 124</p> <p>1 causal factor in at least one drowning and rescue 2 incident; true? 3 A. According to the newspaper reports. 4 Q. According to the newspaper reports from 5 which you conducted your analysis; correct? 6 A. Yes. 7 Q. All right. And the one drowning incident in 8 which the presence of foam appeared to be a causal 9 factor was the incident that occurred in 2013; 10 correct? 11 A. Yes. 12 Q. Which we've already discussed as having 13 occurred in approximately the same area as where 14 Maggie Zaiger went into the water; correct? 15 A. That's my understanding. 16 Q. Okay. As a general proposition, how many 17 times does a hazard have to manifest itself in the 18 injury or death to a human being before it warrants 19 being acted upon? 20 A. And hazard analyses you don't necessarily 21 look at number of incidents, you look at of all the 22 incidents, you know -- Well first you do an analyses 23 of each incident, what appears to be the primary 24 factors at work responsible for causing this injury 25 incident. And then, once you have -- once you've</p>

<p style="text-align: right;">Page 125</p> <p>1 identified all of those factors, then you assess the</p> <p>2 frequency of occurrence and the severity of injury</p> <p>3 that, you know, might occur.</p> <p>4 Q. Before rendering your opinions did you</p> <p>5 conduct any analyses that -- of the number of visitors</p> <p>6 to the Falls Park area during the months of February</p> <p>7 and March for the last 10 years?</p> <p>8 A. Estimates from the city are that 700,000</p> <p>9 people visit in a year. Those are recent numbers. I</p> <p>10 don't know whether that has been maintained over the</p> <p>11 last 20 or 30 years or not. I have not seen any data</p> <p>12 when those visitors are, whether the bulk of them are</p> <p>13 in the summer months or they're spread evenly</p> <p>14 throughout the year, so I can't answer that question.</p> <p>15 Q. So the answer is --</p> <p>16 A. I don't know that --</p> <p>17 Q. -- no.</p> <p>18 A. -- the information is available. Yeah.</p> <p>19 Q. The answer is no.</p> <p>20 A. That's correct.</p> <p>21 Q. Okay. And you are aware that the foam</p> <p>22 buildup that occurs at Falls Park is a seasonal event.</p> <p>23 A. That's my understanding, yes.</p> <p>24 Q. And that's what you were told; correct?</p> <p>25 A. That's correct.</p>	<p style="text-align: right;">Page 127</p> <p>1 Q. We want those warnings to be effective;</p> <p>2 correct?</p> <p>3 A. Yes.</p> <p>4 Q. In order to determine the effectiveness of</p> <p>5 tornado warnings you would typically look at how many</p> <p>6 tornadoes there are and whether people respond to the</p> <p>7 warnings when the tornadoes are present; correct?</p> <p>8 A. That would be, yeah, one way to do it, yes.</p> <p>9 Q. Well if tornado season in the Midwest is May</p> <p>10 through roughly maybe early September, those would be</p> <p>11 the salient months to look at; true?</p> <p>12 A. Sure, if those are the times that the</p> <p>13 tornado warnings are put out, so yes.</p> <p>14 Q. Well I think most people in the Midwest</p> <p>15 would know that.</p> <p>16 Would you look at January to determine</p> <p>17 whether tornado warnings are effective during the</p> <p>18 month of January in the Midwest?</p> <p>19 A. Probably not.</p> <p>20 Q. Okay. So if the buildup of foam is in</p> <p>21 February and March, it would make sense to look at how</p> <p>22 many visitors there are to the park during February</p> <p>23 and March; correct?</p> <p>24 A. Sure.</p> <p>25 Q. And it would -- what happens in August would</p>
<p style="text-align: right;">Page 126</p> <p>1 Q. And that is typically during the months of</p> <p>2 February and March; correct?</p> <p>3 A. That's what I've been told, yes.</p> <p>4 Q. And that would be the relevant time period</p> <p>5 to look at, would it not, for an analysis of whether</p> <p>6 the foam buildup is a causal factor in any incidents</p> <p>7 at that park, as opposed to looking at the month of</p> <p>8 September.</p> <p>9 A. That's correct.</p> <p>10 Q. Okay. And you've made no effort to -- to</p> <p>11 undertake to determine the number of visitors who go</p> <p>12 to the park on an annual basis during February and</p> <p>13 March; correct?</p> <p>14 A. That's correct.</p> <p>15 Q. And is --</p> <p>16 A. I did note in my report that a few of the</p> <p>17 incidents -- of the 42 incidents described in the</p> <p>18 newspaper article occurred in February, so. Yeah, 10</p> <p>19 percent. Four out of the 42 occurred in February or</p> <p>20 March when the foam builds up on parts of the river.</p> <p>21 Q. Well let me -- let me give you a</p> <p>22 hypothetical or an example or an analogy.</p> <p>23 Nowadays they issue warnings for tornadoes;</p> <p>24 right?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 128</p> <p>1 be of minimal, if any, relevance to that analysis;</p> <p>2 correct?</p> <p>3 A. You know, again, if you're evaluating the</p> <p>4 contribution of foam.</p> <p>5 Q. And that's what we're talking about; --</p> <p>6 A. Yes.</p> <p>7 Q. -- correct?</p> <p>8 A. Yes. Yes. Okay. Yes.</p> <p>9 Q. And then you could conduct a valid</p> <p>10 scientific analysis of how often foam is a</p> <p>11 contributing factor in either an accident -- or I</p> <p>12 should say a death or an injury or a near death or</p> <p>13 injury; correct?</p> <p>14 A. If you're looking at analyses of foam</p> <p>15 specifically, and not in the context of all hazards,</p> <p>16 then yes, you'd want to look at data for the relevant</p> <p>17 months.</p> <p>18 Q. Are you aware of any allegation in this case</p> <p>19 that the entire property of Falls Park is somehow</p> <p>20 hazardous?</p> <p>21 A. Well the --</p> <p>22 Q. Are you --</p> <p>23 A. -- risk analyses that were performed looked</p> <p>24 at, and they should look at the entire park to</p> <p>25 evaluate what hazards are in the entire park.</p>

<p style="text-align: right;">Page 129</p> <p>1 Q. You are aware that our claim is related to</p> <p>2 the buildup of foam in Falls Park; yes?</p> <p>3 A. Yes.</p> <p>4 Q. Okay. So I just want to make sure I</p> <p>5 understand something. You have conducted an analysis</p> <p>6 of 42 incidents based upon what the Argus Leader has</p> <p>7 reported, but you have not conducted any further</p> <p>8 analysis into drownings or near drownings occurring at</p> <p>9 Falls Park in February or March where foam is alleged</p> <p>10 to have been present or a contributing factor; is that</p> <p>11 right?</p> <p>12 A. That's right.</p> <p>13 Q. Okay.</p> <p>14 A. I'm not aware of any information to that</p> <p>15 effect beyond what I described in my report.</p> <p>16 Q. Did you ask for that information?</p> <p>17 A. I have not.</p> <p>18 Q. All right. And you do agree that the</p> <p>19 presence of foam appeared to be a causal factor in the</p> <p>20 2013 drownings.</p> <p>21 A. Well --</p> <p>22 Q. Isn't that what your report indicates?</p> <p>23 A. Again, this statement has to do with factors</p> <p>24 identified by the newspaper as somehow related to this</p> <p>25 incident --</p>	<p style="text-align: right;">Page 131</p> <p>1 Leader has reported?</p> <p>2 A. I did not.</p> <p>3 Q. Do you hold an opinion as to whether or not</p> <p>4 the presence of foam was or was not a causal factor in</p> <p>5 the 2013 drowning incident?</p> <p>6 A. Yeah. Again, I have not done that analyses</p> <p>7 for the 2013 incident.</p> <p>8 Q. So the answer is no.</p> <p>9 A. Yes.</p> <p>10 Q. If the presence of foam was found to be a</p> <p>11 causal factor in the 2013 drowning incident, do you</p> <p>12 hold the opinion or would you hold the opinion that</p> <p>13 efforts should have been undertaken to address that</p> <p>14 hazard?</p> <p>15 MR. MOORE: Object to form and foundation.</p> <p>16 A. My understanding of city staff and -- and</p> <p>17 risk management efforts they undertook is they might</p> <p>18 have looked at foam, but did not consider it a hazard,</p> <p>19 and therefore they did not take any -- or make any</p> <p>20 efforts to address hazard of the foam in terms of</p> <p>21 trying to mitigate that hazard.</p> <p>22 Q. Right. I want to --</p> <p>23 A. So based on their analyses, then I would</p> <p>24 have to say that they did not consider foam to be a</p> <p>25 hazard after the 2013 incident and before the 2018</p>
<p style="text-align: right;">Page 130</p> <p>1 Q. Well --</p> <p>2 A. -- as -- and that is what I am reporting</p> <p>3 here. So this is a description of hazards according</p> <p>4 to analyses of 42 injury and fatal incidents. That's</p> <p>5 -- This is the only database that I know about, so I</p> <p>6 finish with describing, you know, foam is only</p> <p>7 mentioned in one. I don't know that -- I don't recall</p> <p>8 that the event description said foam is a causal</p> <p>9 factor, it was just something that seems to be</p> <p>10 related.</p> <p>11 Q. You had the benefit of all of the law</p> <p>12 enforcement reports related to the 2013 incidents --</p> <p>13 A. Yes.</p> <p>14 Q. -- incident; correct?</p> <p>15 And it's true that foam is repeatedly</p> <p>16 mentioned as a factor in not only the drowning, but</p> <p>17 the rescue efforts. Isn't that true?</p> <p>18 A. No. My recollection is --</p> <p>19 Q. All right.</p> <p>20 A. -- they mention foam as impeding rescue</p> <p>21 efforts. But I don't recall, you know, statements to</p> <p>22 the effect that foam caused Garrett to fall.</p> <p>23 Q. Did you make any attempt to analyze whether</p> <p>24 or not the presence of foam was a causal factor in the</p> <p>25 2013 drownings, independent of anything that the Argus</p>	<p style="text-align: right;">Page 132</p> <p>1 incident.</p> <p>2 MR. SIEFF: Move to strike.</p> <p>3 Q. You are a human factors engineer, and also</p> <p>4 are certified in safety matters; yes?</p> <p>5 A. I'm a certified ergonomics professional.</p> <p>6 Q. Okay. And you are -- consult or in the past</p> <p>7 you've been asked to perform hazard analyses; correct?</p> <p>8 A. I have done that, yes.</p> <p>9 Q. And you've been asked to provide</p> <p>10 recommendations on how to address any particular</p> <p>11 hazard; correct?</p> <p>12 A. I have done that, yes.</p> <p>13 Q. Including things like roller coasters;</p> <p>14 correct?</p> <p>15 A. Yes.</p> <p>16 Q. Okay. So here's what I would like to know:</p> <p>17 If the City of Sioux Falls came to you in 2014 and</p> <p>18 said, Dr. Nemire, we had this drowning occur -- two</p> <p>19 drownings occur at our park in 2013 and we believe</p> <p>20 that the foam buildup was a causal factor in this,</p> <p>21 what steps would you recommend, as a human factors</p> <p>22 specialist or expert, to address that hazard?</p> <p>23 A. Well first I would ask what analyses they</p> <p>24 conducted to come to the conclusion that foam was a</p> <p>25 hazard.</p>

<p style="text-align: right;">Page 133</p> <p>1 Q. Okay.</p> <p>2 A. Just because someone thinks, you know --</p> <p>3 Q. Okay.</p> <p>4 A. -- of something has a hazard does not</p> <p>5 necessarily mean that it is. So I'd want to know what</p> <p>6 the basis of their thinking is.</p> <p>7 Q. Okay.</p> <p>8 A. And if I was not satisfied with the bases,</p> <p>9 then I would conduct my own hazard analyses of the</p> <p>10 foam.</p> <p>11 Q. All right. We'll get to what you would do</p> <p>12 if you concluded it was a hazard, but before we do</p> <p>13 that I want to ask you what would the proper hazard</p> <p>14 analysis have consisted of?</p> <p>15 You just testified that you would ask them</p> <p>16 if they had done a hazard analyses and would want to</p> <p>17 know the bases. What would a proper hazard analysis</p> <p>18 at that time have consisted of?</p> <p>19 A. Yeah. That would take a lot more thought</p> <p>20 and examination of the literature, you know, to</p> <p>21 determine what kind of hazard analyses tasks I would</p> <p>22 undertake, so --</p> <p>23 Q. You --</p> <p>24 A. -- and that's not something that I've</p> <p>25 evaluated up until today.</p>	<p style="text-align: right;">Page 135</p> <p>1 Q. Would you --</p> <p>2 A. I have not been asked to do that for this</p> <p>3 incident, and so I can't and don't want to outline,</p> <p>4 you know, all the steps that someone could take.</p> <p>5 Q. You --</p> <p>6 A. Because I haven't thought about it very</p> <p>7 much.</p> <p>8 Q. Yeah. Well you got a lot of experience in</p> <p>9 this sort of thing, and I assume you know how to go</p> <p>10 about doing a hazard analysis when you're asked to.</p> <p>11 And you did mention that you would look at the reports</p> <p>12 from that day, you would talk to the people that day,</p> <p>13 and you'd try and visit it at the same time. Would</p> <p>14 you also do the kind of statistical analysis you did</p> <p>15 here --</p> <p>16 A. Sure.</p> <p>17 Q. -- in this case?</p> <p>18 And what if -- what if you did that</p> <p>19 statistical analysis and found out there had been 42</p> <p>20 drownings or near drownings and only one of them was</p> <p>21 precipitated by foam, or where foam was a causal</p> <p>22 factor? Would you then tell the city that that was</p> <p>23 not a hazard they had to deal with?</p> <p>24 A. Well as I said at some point earlier today,</p> <p>25 there are multiple causal factors for most incidents,</p>
<p style="text-align: right;">Page 134</p> <p>1 Q. You said you would ask them about the bases</p> <p>2 for that, and if you were not satisfied that the bases</p> <p>3 provided a reasonable foundation for concluding that</p> <p>4 the foam was a hazard you would conduct your own</p> <p>5 analysis. As part of the own analysis that -- your</p> <p>6 own analysis you referred to, would you review law</p> <p>7 enforcement records?</p> <p>8 A. Sure.</p> <p>9 Q. Would you interview law enforcement</p> <p>10 personnel who responded to the scene?</p> <p>11 A. I might.</p> <p>12 Q. Would you have interviewed witnesses?</p> <p>13 A. Yes.</p> <p>14 Q. Would you have visited the site under same</p> <p>15 or substantially similar circumstances?</p> <p>16 A. Yes.</p> <p>17 Q. What else would you have done?</p> <p>18 A. Yeah. Again, that has not been my task to</p> <p>19 actually, you know, conduct a hazard analyses beyond</p> <p>20 the one that I did during my site visit, so --</p> <p>21 Q. Would you do --</p> <p>22 A. -- in this kind of effort, if a client asked</p> <p>23 me to conduct a hazard analyses then I would be -- you</p> <p>24 know, go through a number of different steps, probably</p> <p>25 several different types of analyses and perform those.</p>	<p style="text-align: right;">Page 136</p> <p>1 and as with the 2018 incident, there's the -- the</p> <p>2 hazard of the cliff which presents a fall hazard,</p> <p>3 there's the hazard of the turbulent water, there's the</p> <p>4 problem of supervisory control of young children,</p> <p>5 there's a number of issues at play, and so foam might</p> <p>6 be one of those.</p> <p>7 Q. Sure.</p> <p>8 A. I would evaluate whether the incidents I'm</p> <p>9 looking at, you know, whether -- whether truly, you</p> <p>10 know, foam is -- you know, was an issue at -- at --</p> <p>11 sort of providing -- or hiding the nature of a hazard.</p> <p>12 Q. Sure.</p> <p>13 So if you did determine, after doing your</p> <p>14 own analysis, that one of the 42 incidents involved a</p> <p>15 situation where foam was a causal factor, would you be</p> <p>16 of the mind that because it was only one of 42, there</p> <p>17 was no need to address the situation?</p> <p>18 A. Well there's other issues at play, you know,</p> <p>19 there's -- as I've mentioned. And so at issue is</p> <p>20 which -- which causal factors are primary, which are,</p> <p>21 you know, closer to the -- you know, to the event, you</p> <p>22 know, which are farther away; which of these, if</p> <p>23 eliminated, you know, might have eliminated the hazard</p> <p>24 or the injury incident. It's -- You know, so I would</p> <p>25 look at all of those issues.</p>

<p style="text-align: right;">Page 137</p> <p>1 The information I have seen right now does</p> <p>2 not indicate to me that foam is a hazard, so I don't</p> <p>3 -- I can't imagine that if I had done more extensive</p> <p>4 hazard analyses that you're trying to get me to -- to</p> <p>5 describe, I don't know that I would have identified</p> <p>6 foam as a hazard in the 2013 instance either.</p> <p>7 Q. As a statistical matter, does the fact that</p> <p>8 out of 42 incidents only one incident appears to be</p> <p>9 related to a particular causal factor mean that that</p> <p>10 one incident does not need to be addressed going</p> <p>11 forward?</p> <p>12 A. No.</p> <p>13 Q. All right. Thank you.</p> <p>14 Now you referred to the area --</p> <p>15 A. You didn't let me finish my response.</p> <p>16 Q. You said "no."</p> <p>17 A. And I was taking a breath so I could --</p> <p>18 MR. MOORE: That's all right.</p> <p>19 THE WITNESS: All right.</p> <p>20 Q. When you went to the falls on July 11, 2019,</p> <p>21 was that your first visit to Falls Park?</p> <p>22 A. Yes.</p> <p>23 Q. Was that your first visit to South Dakota?</p> <p>24 A. Maybe. I might have driven through.</p> <p>25 Q. Okay. And what was the weather like on the</p>	<p style="text-align: right;">Page 139</p> <p>1 A. (Witness reviewing documents.) Well yes,</p> <p>2 there are more than just those people, adults with</p> <p>3 children at the park, there are other people that I</p> <p>4 did not make any effort to count them.</p> <p>5 Q. I'm trying to understand if there were</p> <p>6 hundreds of people there, 20 people, 500; how busy was</p> <p>7 the park?</p> <p>8 A. It's hard to say. There was a fair number</p> <p>9 of people around. The cafe was pretty full.</p> <p>10 Q. Now you went to the park with who?</p> <p>11 A. I was there with a research assistant, I met</p> <p>12 Ms. Carpenter, I met Mr. Mieras, met Detective Bakke.</p> <p>13 I believe that's it.</p> <p>14 Q. Who's the research assistant?</p> <p>15 A. His name is Daniel Nemire, he's my son.</p> <p>16 Q. Okay. Page 5 of your report you state: I</p> <p>17 conducted a site inspection on June 11, 2019. During</p> <p>18 the site inspection I was accompanied by -- part of</p> <p>19 the time by Melanie Carpenter, Kirby Mieras, and Tim</p> <p>20 Bakke. Why did you not identify your son?</p> <p>21 A. It was an oversight.</p> <p>22 Q. Was he there in an official capacity?</p> <p>23 A. Yes.</p> <p>24 Q. And you read your report before you</p> <p>25 submitted it to Mr. Moore?</p>
<p style="text-align: right;">Page 138</p> <p>1 day you were there?</p> <p>2 A. What time of day?</p> <p>3 Q. Let's start at --</p> <p>4 Well that's a good question.</p> <p>5 How long were you there?</p> <p>6 A. About 12 hours. Well, no, 10 altogether</p> <p>7 maybe. So in the morning it started out clear, I</p> <p>8 don't know, maybe '60s, '70s weather, was not wearing</p> <p>9 a jacket, and then about 5 or 5:30 a big storm rolled</p> <p>10 in for a couple of hours.</p> <p>11 Q. Rainstorm.</p> <p>12 A. Hail --</p> <p>13 Q. No snow.</p> <p>14 A. -- and rain.</p> <p>15 Q. No snow.</p> <p>16 A. No snow.</p> <p>17 Q. There was no snow on July 11th, '19; was</p> <p>18 there?</p> <p>19 A. Not that I noticed.</p> <p>20 Q. Okay. How many people did you count at the</p> <p>21 park being there while you were there?</p> <p>22 A. Well I only counted families with small</p> <p>23 children that were around the river.</p> <p>24 Q. Were there more than those families with</p> <p>25 small children present in the park?</p>	<p style="text-align: right;">Page 140</p> <p>1 A. Yes.</p> <p>2 Q. And this was an oversight?</p> <p>3 A. Apparently so.</p> <p>4 Q. Any other oversights in your report we</p> <p>5 should know about?</p> <p>6 A. Not that I'm aware of.</p> <p>7 Q. Did your son take notes from -- during the</p> <p>8 visit?</p> <p>9 A. Yes.</p> <p>10 Q. Where are those notes?</p> <p>11 A. Some of them I transcribed on the computer,</p> <p>12 and some of them I have here.</p> <p>13 Q. Was he writing them or typing them into a</p> <p>14 machine of some sort, like a computer?</p> <p>15 A. He was hand writing --</p> <p>16 Q. Okay.</p> <p>17 A. -- on a yellow legal pad.</p> <p>18 Q. Were -- Were you taking notes?</p> <p>19 A. Yes, I also took notes.</p> <p>20 Q. Can I see these notes?</p> <p>21 A. The notes I took --</p> <p>22 Q. All the notes from that inspection, please.</p> <p>23 A. Right. They are -- Some of the notes I took</p> <p>24 are transcribed in the interview document that</p> <p>25 apparently was sent to you, and then other notes are</p>

<p style="text-align: right;">Page 141</p> <p>1 described -- transcribed into a document called</p> <p>2 "Notes."</p> <p>3 Q. Where are the handwritten notes that existed</p> <p>4 before they were transcribed?</p> <p>5 A. I don't keep those.</p> <p>6 Q. They were thrown away?</p> <p>7 A. Yes.</p> <p>8 Q. Okay. Do you have the transcription?</p> <p>9 A. Yes.</p> <p>10 Q. Can I see it, please?</p> <p>11 A. [Handing.] The top of the page it says Site</p> <p>12 Visit Notes or something like that.</p> <p>13 Q. In your site visit notes under 3F you put</p> <p>14 "NB," which I believe is a note, question. Photos</p> <p>15 show little snow on ground; why would someone think</p> <p>16 there was thick snow built up on one location on</p> <p>17 river, question mark.</p> <p>18 Read that correctly?</p> <p>19 A. (Witness reviewing document.) Which one is</p> <p>20 this?</p> <p>21 Q. I think it's number 3. I don't have a copy</p> <p>22 of it so I can't look at it.</p> <p>23 A. Yeah. Photos show little snow on ground.</p> <p>24 Q. And you only observed little snow on ground</p> <p>25 when you were there; right?</p>	<p style="text-align: right;">Page 143</p> <p>1 Q. White and fluffy?</p> <p>2 A. Sure.</p> <p>3 Q. So that's your description of the -- of it;</p> <p>4 right? You're not -- You don't --</p> <p>5 You don't have a basis from anybody's</p> <p>6 testimony that the snow appeared to be white and</p> <p>7 fluffy; do you?</p> <p>8 A. Testimony is -- is absent descriptions. All</p> <p>9 they say is that the big pile of stuff that looked</p> <p>10 like snow. So big piles of snow might be considered</p> <p>11 -- might be described as fluffy.</p> <p>12 Q. By who?</p> <p>13 A. Anybody looking at a big pile of snow.</p> <p>14 Q. Anybody --</p> <p>15 A. But no, none of these members of these two</p> <p>16 -- of this party provided any descriptive</p> <p>17 characteristics of this pile of stuff.</p> <p>18 Q. Did anyone of this party provide any</p> <p>19 testimony as to the basis for their belief that it was</p> <p>20 snow, a pile of snow?</p> <p>21 A. No.</p> <p>22 Q. Okay. And how much time have you spent in</p> <p>23 the Upper Midwest, sir?</p> <p>24 A. Define "Upper Midwest." What's your</p> <p>25 definition of "Upper Midwest"?</p>
<p style="text-align: right;">Page 142</p> <p>1 A. Well these -- the photographs I'm referring</p> <p>2 to here are the photographs taken on the day of the</p> <p>3 incident.</p> <p>4 Q. And the question you pose, then, it's a</p> <p>5 thought question, a working question, I understand.</p> <p>6 Why would anyone think there was snow on the river</p> <p>7 when there is little snow on the ground; right?</p> <p>8 A. That's correct.</p> <p>9 Q. Did you get an answer to that question?</p> <p>10 A. Well, no. I still wonder about it because</p> <p>11 the -- you know, if -- if this family, these two</p> <p>12 families thought that the foam piled on the river was</p> <p>13 snow, it would be odd to see such a huge pile of snow</p> <p>14 and not see snow anywhere else. And the other</p> <p>15 photographs taken the day of the incident show small</p> <p>16 patches of snow that might be maybe an inch tall, an</p> <p>17 inch high, but no -- certainly no mounds of snow</p> <p>18 anywhere else. So it's -- I don't know, it was just</p> <p>19 hard to imagine how someone would think that the 10 to</p> <p>20 15 foot pile of white fluffy stuff would be snow.</p> <p>21 Q. It was white --</p> <p>22 Who described it as "white fluffy"?</p> <p>23 A. Well if you think it's snow, snow is white,</p> <p>24 it's not a dense material, you know, so, you know,</p> <p>25 it's -- snow could be described as white and fluffy.</p>	<p style="text-align: right;">Page 144</p> <p>1 Q. I have the same definition as everyone who</p> <p>2 lives here has.</p> <p>3 A. Okay.</p> <p>4 Q. North Dakota, South Dakota, Minnesota, Iowa.</p> <p>5 How much time have you spent in the Upper Midwest?</p> <p>6 A. Yeah, probably driven through Iowa.</p> <p>7 Q. Winter, fall, spring or summer?</p> <p>8 A. It would have been summer.</p> <p>9 Q. Okay. Have you spent any time at all in</p> <p>10 North Dakota, South Dakota, or Minnesota in the</p> <p>11 winter?</p> <p>12 A. No.</p> <p>13 Q. How often does it snow where your office is</p> <p>14 located in San Francisco?</p> <p>15 A. Rarely, if at all.</p> <p>16 Q. So you're not used to seeing snow piles; is</p> <p>17 that fair?</p> <p>18 A. Well that presupposes that I've never</p> <p>19 visited areas that do have snow.</p> <p>20 Q. I just asked you if you're used to seeing</p> <p>21 snow piles.</p> <p>22 A. I have seen snow piles, yes.</p> <p>23 Q. Okay. Where?</p> <p>24 A. Parts of California in the Sierra that has</p> <p>25 snow which I visited a number of occasions.</p>

Page 145	Page 147
<p>1 Q. In the mountains?</p> <p>2 A. Yes.</p> <p>3 Q. Have you seen accumulations of snow in the</p> <p>4 Upper Midwest?</p> <p>5 A. Well, as I said, I've maybe just driven</p> <p>6 through the states that you described, and it was in</p> <p>7 summertime and so I would not see any snow in the</p> <p>8 Upper Midwest.</p> <p>9 Q. Is it your opinion that the party that day</p> <p>10 had no basis to believe that the pile of white stuff</p> <p>11 was snow?</p> <p>12 A. That's not what I said.</p> <p>13 Q. I'm asking you a question.</p> <p>14 A. I wonder how they could think it was snow.</p> <p>15 Q. Okay.</p> <p>16 A. I'm not saying that they shouldn't see this</p> <p>17 as snow, it's just a curiosity. I do not understand</p> <p>18 how they could view that as snow, given the absence of</p> <p>19 snow everywhere else on that day.</p> <p>20 Q. You did see snow in the photographs from</p> <p>21 that day.</p> <p>22 A. Yes.</p> <p>23 Q. So when you say "the absence of snow,"</p> <p>24 that's not technically correct; is it?</p> <p>25 A. The absence of piles of snow is what I</p>	<p>1 circumstances would have been substantially similar to</p> <p>2 what existed on March 18, 2018, other than the fact</p> <p>3 you hadn't been hired by anybody; correct?</p> <p>4 A. Well I would -- I would think that would be</p> <p>5 a critical reason.</p> <p>6 Q. I'm just asking the question. Is that true?</p> <p>7 A. That would be -- you know, why?</p> <p>8 MR. SIEFF: Okay.</p> <p>9 MR. MOORE: Counsel, I don't want to</p> <p>10 interrupt, but just for the record, we've been</p> <p>11 referring to the date of the site visit as July 11th,</p> <p>12 2019, and I think it's June 11, 2019.</p> <p>13 MR. SIEFF: I apologize, and you're</p> <p>14 absolutely correct, Jim. I -- If -- I meant no ill</p> <p>15 by that.</p> <p>16 MR. MOORE: Understood. I just wanted to</p> <p>17 clarify it.</p> <p>18 BY MR. MOORE:</p> <p>19 Q. So when you went to the park on July 11,</p> <p>20 2019 --</p> <p>21 MS. YOEDICKE: June.</p> <p>22 MR. SIEFF: Jesus, I just did it. When you</p> <p>23 -- I'm going to write it down.</p> <p>24 (Laughter.)</p> <p>25 BY MR. SIEFF:</p>
Page 146	Page 148
<p>1 should have said.</p> <p>2 Q. Of piles of snow.</p> <p>3 A. Yes.</p> <p>4 Q. Okay. Thank you.</p> <p>5 When you visited the park on July 11, 2019,</p> <p>6 how was it determined who was going to accompany you?</p> <p>7 Let me put it</p> <p>8 A. I don't understand the question.</p> <p>9 Q. -- in English for you.</p> <p>10 You visited the park on July 11, 2019;</p> <p>11 correct?</p> <p>12 A. That's correct.</p> <p>13 Q. Several months after the season for foam</p> <p>14 buildup in the area; correct?</p> <p>15 A. Yes.</p> <p>16 Q. You saw very little foam buildup; true?</p> <p>17 A. Certainly not as much as I saw in the</p> <p>18 photographs.</p> <p>19 Q. You did not visit the park at a timeframe</p> <p>20 which provided a substantially similar set of</p> <p>21 circumstances as that would have existed on March</p> <p>22 18th, 2018; true?</p> <p>23 A. That's correct.</p> <p>24 Q. And nothing prevented from -- you from</p> <p>25 visiting the park during a timeframe when the</p>	<p>1 Q. When you went to the park on June 11, 2019,</p> <p>2 two people from the city went with you, Mr. Mieras,</p> <p>3 and Detective Bakke.</p> <p>4 A. I met them there.</p> <p>5 Q. Okay. They met you there.</p> <p>6 A. Yes.</p> <p>7 Q. Okay. Did you talk to any city employees</p> <p>8 before you got to the park?</p> <p>9 A. The only people I talked with before were</p> <p>10 Mr. Moore and people from his office.</p> <p>11 Q. Other than what you may have talked to Mr.</p> <p>12 Bakke and Mr. Mieras about on June 11, have you</p> <p>13 conducted any interviews of city employees?</p> <p>14 A. I called Kelby Mieras sometime, maybe a few</p> <p>15 days before my report was due, because I realized I</p> <p>16 did not have information about how long this foam</p> <p>17 buildup has been occurring, so I called him to ask him</p> <p>18 if he knew, and he told me that at least since -- I</p> <p>19 think there's a note there in the -- in my notes</p> <p>20 document about that phone call. I think he told me it</p> <p>21 was since at least 1980 or 1984, something like that.</p> <p>22 Q. Well the -- the notes -- the transcribed</p> <p>23 notes I'm looking at state they're interview</p> <p>24 transcripts from the site visit, not from a later</p> <p>25 phone call, but --</p>

<p style="text-align: right;">Page 149</p> <p>1 A. Do you still have my notes document?</p> <p>2 Q. -- be that as it may.</p> <p>3 A. I have it.</p> <p>4 Q. Be that as it may.</p> <p>5 Anybody else you've interviewed personally?</p> <p>6 A. Yeah. May 31st is when I talked with Mr.</p> <p>7 Mieras.</p> <p>8 Q. All right. Anybody else you've interviewed?</p> <p>9 A. No.</p> <p>10 Q. Have you been refused access to anybody you</p> <p>11 have wanted to interview?</p> <p>12 A. No.</p> <p>13 Q. Have you made any attempts to interview</p> <p>14 Crissy Melendez?</p> <p>15 A. No.</p> <p>16 Q. Who -- Who --</p> <p>17 Did you have any input into selecting Mr.</p> <p>18 Mieras and Detective Bakke to meet you at the park?</p> <p>19 A. No.</p> <p>20 Q. Do you know who made that decision?</p> <p>21 A. I do not.</p> <p>22 Q. Did you request that other employees of the</p> <p>23 city meet you at the park other than Mr. Mieras and</p> <p>24 Ms. -- and Detective Bakke?</p> <p>25 A. No. I think either Mr. Moore or Ms.</p>	<p style="text-align: right;">Page 151</p> <p>1 enough that an engineer was on site when we were</p> <p>2 talking about all this and he had blueprints of the</p> <p>3 platform construction, and he confirmed that a large</p> <p>4 outcrop -- outcropping showed in one of Ms. Melendez's</p> <p>5 photographs had been removed, and he identified, based</p> <p>6 on blueprints, where that outcropping had been.</p> <p>7 Q. Did he tell you --</p> <p>8 What was that engineer's name?</p> <p>9 A. I don't believe I wrote it down, didn't get</p> <p>10 that information.</p> <p>11 Q. That wasn't important to you?</p> <p>12 A. Not really.</p> <p>13 Q. Okay.</p> <p>14 A. What was important was he was the engineer</p> <p>15 and he had the blueprints and seemed to know what he</p> <p>16 was talking about.</p> <p>17 Q. Did he tell you when this rock outcropping</p> <p>18 was removed?</p> <p>19 A. Specifically what date, no.</p> <p>20 Q. Did he tell you what he understood to be the</p> <p>21 reason for the removal of the rock outcropping?</p> <p>22 A. I believe he said something that it was in</p> <p>23 the way of the pla -- the viewing platform, where they</p> <p>24 wanted to put the viewing platform.</p> <p>25 Q. All right. During your site visit on June</p>
<p style="text-align: right;">Page 150</p> <p>1 Carpenter thought it would be helpful, and I realized</p> <p>2 it would be helpful just to -- to make sure that we</p> <p>3 identified the area where Maggie fell and the --</p> <p>4 Detective Bakke had a good understanding of that. And</p> <p>5 so I thought it was a good idea and I said, yes, that</p> <p>6 seems like a good idea.</p> <p>7 Q. And Detective Bakke freely answered whatever</p> <p>8 questions you had?</p> <p>9 A. Yes.</p> <p>10 Q. And appeared truthful to you?</p> <p>11 A. Yes.</p> <p>12 Q. And was helpful to you?</p> <p>13 A. Yes.</p> <p>14 Q. And during your site visit he pointed out</p> <p>15 where he remembered the incident as having occurred?</p> <p>16 A. It wasn't as simple as that.</p> <p>17 Q. I understand. He needed some photographs.</p> <p>18 A. And --</p> <p>19 Because the area has substantially changed</p> <p>20 since the photographs on the date of the incident and</p> <p>21 the day of our visit. So it was a combination of</p> <p>22 Detective Bakke trying to refresh his memory as he was</p> <p>23 standing on the edge of the river, showing him</p> <p>24 photographs that Ms. Melendez had taken, showing him</p> <p>25 photographs from the police files, and we were lucky</p>	<p style="text-align: right;">Page 152</p> <p>1 11, 2019 you identified certain hazards present at</p> <p>2 Falls Park; correct?</p> <p>3 A. Certain hazards in the area, in the subject</p> <p>4 area of Fall Park -- Falls Park.</p> <p>5 Q. I understand.</p> <p>6 A. I did not evaluate hazards in the rest of</p> <p>7 the park beyond that one area.</p> <p>8 Q. I really only want to talk about the area</p> <p>9 proximate to where --</p> <p>10 A. Just clarifying.</p> <p>11 Q. -- the 2013 drownings occurred and where</p> <p>12 Maggie went in.</p> <p>13 A. Okay.</p> <p>14 Q. And you -- Detective Bakke eventually</p> <p>15 identified the area of the rocky ledge from which</p> <p>16 Maggie fell.</p> <p>17 A. Yes.</p> <p>18 Q. Okay. And your inspection of that area</p> <p>19 confirmed that the height of the rocky walls above the</p> <p>20 river presented a fall hazard; correct?</p> <p>21 A. That's correct.</p> <p>22 Q. And that the depth and flow of the river</p> <p>23 presented a drowning hazard; correct?</p> <p>24 A. Yes.</p> <p>25 Q. Now when you were standing --</p>

<p style="text-align: right;">Page 153</p> <p>1 Did you stand proximate or near to the rocky</p> <p>2 ledge that Detective Bakke identified?</p> <p>3 A. How would you define "near"?</p> <p>4 Q. Within twenty feet.</p> <p>5 A. Of course.</p> <p>6 Q. Okay. And when you were there the river was</p> <p>7 freely flowing; correct?</p> <p>8 A. Yes.</p> <p>9 Q. And you could hear the river from where you</p> <p>10 were standing when you were within twenty feet of the</p> <p>11 rocky ledge; correct?</p> <p>12 A. Yes.</p> <p>13 Q. And isn't it true that on the date where</p> <p>14 Maggie fell into the river, the foam created a</p> <p>15 situation where you could not hear the current of the</p> <p>16 river in that area?</p> <p>17 A. That's what's been reported, yes.</p> <p>18 Q. Isn't that what Detective Bakke told you</p> <p>19 directly on June 11, 2019?</p> <p>20 A. Yes.</p> <p>21 Q. That you could not hear the river?</p> <p>22 A. That's what he reported, yes.</p> <p>23 Q. That it was calm and serene?</p> <p>24 A. Yes.</p> <p>25 Q. And that means that any auditory queueing</p>	<p style="text-align: right;">Page 155</p> <p>1 Well I'll strike that.</p> <p>2 What else did Detective Bakke tell you</p> <p>3 relative to the height of the foam?</p> <p>4 A. I'd have to review my notes. (Witness</p> <p>5 reviewing documents.)</p> <p>6 He said that the foam that was on Maggie's</p> <p>7 side of the river was about two to four feet tall</p> <p>8 above the water, and on the other side of the river it</p> <p>9 was about 20 to 30 feet tall.</p> <p>10 Q. And you've seen photographs that were taken</p> <p>11 on the day of Maggie's death in the area?</p> <p>12 A. Yes.</p> <p>13 Q. Showing you what's been marked as Exhibit</p> <p>14 17. Have you seen this photograph before, sir?</p> <p>15 A. Yes.</p> <p>16 Q. This is Fischer Exhibit 17. That foam</p> <p>17 appears to be somewhere between 10 to 20 feet in</p> <p>18 height; does it not?</p> <p>19 A. In this --</p> <p>20 From this view, which is downstream of where</p> <p>21 Maggie fell, it appears as if the foam is -- well</p> <p>22 maybe in the center it could be -- yeah, it could be</p> <p>23 nine or ten feet tall.</p> <p>24 Q. Okay. You've seen this photograph, which is</p> <p>25 marked Kearney Exhibit 22?</p>
<p style="text-align: right;">Page 154</p> <p>1 that one might otherwise expect from the noise of the</p> <p>2 river was not present on the day Maggie went in;</p> <p>3 correct?</p> <p>4 A. No.</p> <p>5 Q. All right. And isn't it true that Detective</p> <p>6 Bakke told you on June 11, 2019 that foam obscured the</p> <p>7 ledge, the rock ledge Maggie was standing on?</p> <p>8 A. Yes.</p> <p>9 Q. And that if she had stepped forward it would</p> <p>10 have been into the foam.</p> <p>11 A. Yes.</p> <p>12 Q. And that if the foam obscured the ledge, she</p> <p>13 would not have been able to see where the drop-off</p> <p>14 was; correct?</p> <p>15 A. From where --</p> <p>16 Yes. From where she was standing, yes.</p> <p>17 Q. And consequently, the fall hazard you</p> <p>18 identified, the height of the rocky walls, would have</p> <p>19 been obscured by foam; correct?</p> <p>20 A. No.</p> <p>21 Q. The --</p> <p>22 Didn't he tell you that she couldn't see the</p> <p>23 rock ledges below because they were covered by foam?</p> <p>24 A. Yes.</p> <p>25 Q. And that consequently the foam was acting --</p>	<p style="text-align: right;">Page 156</p> <p>1 A. Yes.</p> <p>2 Q. That's a law enforcement officer standing on</p> <p>3 the rocky ledge from which Maggie went into the water?</p> <p>4 A. Yes.</p> <p>5 Q. Are you prepared to testify under oath that</p> <p>6 you -- based on that photograph, that you can see the</p> <p>7 edge of the rocky ledge?</p> <p>8 A. Well as I tried to distinguish in my report,</p> <p>9 there are multiple rocky ledges here. You know, so if</p> <p>10 you look at where this officer is standing, he is</p> <p>11 standing on maybe -- maybe four tiers down from the</p> <p>12 top of the canyon wall. There are multiple levels of</p> <p>13 rocky ledges, and that's something that has not been</p> <p>14 clear in any of the statements that I have read about</p> <p>15 the foam obscuring the ledge. And you can see that</p> <p>16 here from where the officer is standing, you can see</p> <p>17 that there is foam covering rock, but you can also see</p> <p>18 that, you know, maybe a foot above where the officer</p> <p>19 is standing there are sections of the ledge that are</p> <p>20 not covered by foam.</p> <p>21 Q. And you're looking at this photograph today,</p> <p>22 August 20th, 2019; correct?</p> <p>23 A. That's certainly true.</p> <p>24 Q. In hindsight; correct?</p> <p>25 A. Not at all.</p>

<p style="text-align: right;">Page 157</p> <p>1 Q. With --</p> <p>2 After rendering opinion that you don't</p> <p>3 believe that this foam constitutes a hazard; correct?</p> <p>4 A. I -- I think you're mischaracterizing</p> <p>5 everything that I've said here.</p> <p>6 Q. Do you not believe that your opinion on</p> <p>7 whether or not that foam was covering the drop-off is</p> <p>8 just a tad bit influenced by the hindsight bias?</p> <p>9 A. Not at all.</p> <p>10 Q. All right. So when -- when Detective Bakke</p> <p>11 told you that from her standing location she can't see</p> <p>12 rock ledges below because they are covered by foam --</p> <p>13 A. I'm sorry. Say that again.</p> <p>14 Q. When Detective Bakke told you, according to</p> <p>15 your own notes, quote, from her standing location she</p> <p>16 can't see rock ledges below because they are covered</p> <p>17 by foam, end quote; did you give his statement</p> <p>18 credence, or disregard it?</p> <p>19 A. I asked a number of questions to clarify my</p> <p>20 understanding, because I suspected that his earlier</p> <p>21 description of -- of foam covering the rocks where</p> <p>22 Maggie was standing applied to the lower level of</p> <p>23 rocks and not to the top layer of rocks.</p> <p>24 Q. Did you write that down in your notes</p> <p>25 anywhere?</p>	<p style="text-align: right;">Page 159</p> <p>1 level of rock. You can also see that there is -- you</p> <p>2 know, clearly there's one -- a top layer of rock here</p> <p>3 at the bottom of the photograph, and then as you move</p> <p>4 forward in the photograph there's a drop-off of a few</p> <p>5 inches and there is another level of rock ledge. So</p> <p>6 it's a scalloped wall with several levels of</p> <p>7 projecting rocks that -- that create ledges.</p> <p>8 Q. Can you tell me where the water is in</p> <p>9 Exhibit Number 22?</p> <p>10 A. It's under the foam.</p> <p>11 Q. How do you know that?</p> <p>12 A. Because there's nowhere else that the river</p> <p>13 could be except in that area.</p> <p>14 Q. Can you tell me exactly where the foam ends</p> <p>15 and the river starts?</p> <p>16 A. That I don't know.</p> <p>17 Q. Because the foam is covering it; right?</p> <p>18 A. Well --</p> <p>19 Q. Isn't that correct?</p> <p>20 A. The -- You can also see from Exhibit 22 that</p> <p>21 some of the rocks are partially covered by foam but</p> <p>22 not completely covered by foam. Since I was not there</p> <p>23 then, or -- or at any time of high foam, I do -- I</p> <p>24 don't know how many other levels of rock ledges there</p> <p>25 are. I would not expect a shear drop-off there, but</p>
<p style="text-align: right;">Page 158</p> <p>1 A. Yes, I did. He clarified that the top layer</p> <p>2 of rocks were not covered by the foam.</p> <p>3 Q. I'm sorry. Do you have this note in front</p> <p>4 of you, sir?</p> <p>5 A. Yeah.</p> <p>6 Q. Can you tell me --</p> <p>7 A. Item number 3, the last phrase. However,</p> <p>8 the foam did not obscure higher ledges at top of</p> <p>9 canyon wall.</p> <p>10 Q. Did Detective Bakke call this area a canyon?</p> <p>11 A. I don't believe so.</p> <p>12 Q. Okay. That's your words.</p> <p>13 A. Yes.</p> <p>14 Q. Okay. And Detective Bakke told you that it</p> <p>15 did not obscure higher ledges of the rock outcropping.</p> <p>16 A. Yes.</p> <p>17 Q. Can you point to any photograph and tell me</p> <p>18 where -- which rock outcropping he's referring to as</p> <p>19 not being obscured?</p> <p>20 A. Yeah. In Exhibit 22 you can clearly see</p> <p>21 that the officer here --</p> <p>22 Q. No, no.</p> <p>23 A. -- is standing below some level of rock, and</p> <p>24 you can see that because you cannot see all of his</p> <p>25 shoes. That tells you that he is standing below some</p>	<p style="text-align: right;">Page 160</p> <p>1 -- and there could be, you know, multiple levels, you</p> <p>2 know, lower down that are obstruct -- or the view of</p> <p>3 those are obscured by the foam or obstructed by the</p> <p>4 foam, so I can't tell. You can tell that there's</p> <p>5 rocks poking up through the foam. Exactly where the</p> <p>6 edge of the rock -- this particular rock ledge is and</p> <p>7 where the next rock ledge is, if there is one, I could</p> <p>8 not tell you.</p> <p>9 Q. Isn't it true --</p> <p>10 A. But I can tell you, from looking at that</p> <p>11 photograph, that the foam obscures some of the rocky</p> <p>12 ledges, which would indicate that the foam might</p> <p>13 obscure lower rocky ledges, and therefore appreciating</p> <p>14 that fact would tell anybody thinking about walking</p> <p>15 further out on the rocky ledges should be careful,</p> <p>16 because they can't really appreciate where the rock --</p> <p>17 lower rock ledges are because they might be obscured</p> <p>18 by foam, or there just might be nothing but foam and</p> <p>19 river under there.</p> <p>20 Q. So it's your testimony that the fact that</p> <p>21 the foam is covering something should tell someone</p> <p>22 that it's covering something dangerous; is that right?</p> <p>23 A. That the foam is incompletely covering some</p> <p>24 of the rocks, you can tell that from that exhibit,</p> <p>25 would indicate that there might be more rock under the</p>

Page 161

1 foam if you go further out toward the middle of the
2 river, or there might not be anything, you don't know,
3 and therefore you should take some -- some caution if
4 you were to decide that you want to step further out
5 there.

6 Q. Are you saying that a person should never
7 walk on snow or foam ever?

8 A. I didn't say that.

9 Q. Okay.

10 A. As I said, I said you should take some --
11 some caution or proceed more cautiously. The -- And
12 people do. People walk on ice, you know, people walk
13 on mud, and they change their gait accordingly; take
14 shorter steps, they walk more slowly, their stance
15 widens. Those are precautions that we take when we
16 think that we're going -- about to walk on anything
17 other than a solid and stable surface.

18 Q. You state in your report: There has been an
19 implied claim that it would have been safe for Maggie
20 to step on the piled up foam, whether perceived as
21 foam or snow. Neither could be safe. You then go on
22 to state that what few patches of what might have been
23 snow on the ground elsewhere. Based on that an
24 attentive and reasonable person would most likely not
25 surmise that a pile of soft white stuff on the river

Page 163

1 it's okay to step on foam.

2 Q. Or snow.

3 A. Or snow, in this situation.

4 And that is based on the visual queues
5 available about that surface. So that foam can in no
6 way be interpreted as a solid, stable surface. Just
7 the visual characteristics are such that it would --
8 it would -- it would be perceived as something as less
9 dense as, say, a rock ledge, and that if you were to
10 step in the snow -- I guess two things. One, if it
11 were just snow then you would need to step more
12 carefully because the snow itself has -- provides
13 variable surface of support. So you step on the snow,
14 you might sink a little bit, you might sink a lot, and
15 what we do when we're stepping into an area where
16 we're not sure of where the surface of support is,
17 where we knowingly step into an area where there's no
18 known surface of support, is we lower our leg very
19 slowly, in -- and in a controlled manner.

20 So that's what would happen if someone who's
21 paying attention to the lump of snow that they're
22 about to step onto is, I don't know if that's going to
23 be two inches or 10 inches. In the case of Exhibit
24 22, you know, there's some areas where you can make a
25 guess that an area under one part of foam might be

Page 162

1 was snow.

2 What do you base that on? What are your
3 fact --

4 What facts do you base that conclusion on?

5 A. Where are you reading from?

6 Q. Page 8 and 9 of your report.

7 A. Well, okay. Shall we take each sentence at
8 a time? Which particular sentence do you have a
9 question about?

10 Q. Number 8 at page 8. You -- Your conclusion
11 for page 8 --

12 A. Right.

13 Q. Excuse me. Item 8 -- h on page 8 and 9 --

14 A. Yes.

15 Q. -- is that no attentive and reasonable
16 person would have an expectation that the foam or
17 other soft material piled on top of the river would
18 support body weight. And I'm -- I would like you to
19 tell me all the facts upon which you base your
20 conclusion in -- on page 8 and 9, paragraph h.

21 A. Well that's -- that's why it might be more
22 helpful to -- because there's a number of sentences in
23 section -- subsection h, and so -- so the statement
24 that you appear to have a question about, or a concern
25 about is that people should have no expectation that

Page 164

1 rock, and it looks as if there's maybe two inches of
2 this white stuff and maybe it's okay to step there
3 because it looks as if the sur -- the rock surface is
4 two inches below. However, that's assuming a uniform
5 edge, and it's clear in this area of the river and
6 other areas of the river that the edge is not uniform.
7 So it would be risky to step onto any foam that's in
8 this area without being -- without first cautiously
9 lowering your foot so that if there is not a solid and
10 stable surface two inches below where you think it is,
11 then you can still maintain your balance and not fall
12 over.

13 Q. Wouldn't it be just better to put a sign up
14 that says, "stay away from the foam"?

15 A. Again, if the foam is considered the hazard
16 here, and I think the hazard here is -- is not
17 necessarily the foam but it's the jagged edge, you
18 know, is anywhere along here -- and so caution needs
19 to be taken when you approach that. And in this
20 particular case, caution must be taken by the adult
21 person monitoring the behavior of the younger child
22 and evaluate the potential hazards in the area where
23 the child seems to be heading or wanting to go.

24 Q. When did the ice go off -- Or excuse me.

25 Do you know if this river freezes over in

<p style="text-align: right;">Page 165</p> <p>1 this area?</p> <p>2 A. I don't know. Mr. Mieras seemed to think</p> <p>3 that ice was visible in some of the photographs that</p> <p>4 were taken on the date of the incident. When I look</p> <p>5 at it I don't see that it's ice at all.</p> <p>6 Q. Well we're looking at a very small area. My</p> <p>7 question to you is: Do you know, as an expert in</p> <p>8 these human factors things, whether or not this river</p> <p>9 freezes over either above the falls or below the</p> <p>10 falls?</p> <p>11 A. I've been told that it does freeze over in</p> <p>12 some areas.</p> <p>13 Q. All right. Do you know how thick the ice</p> <p>14 gets below the falls?</p> <p>15 A. I do not.</p> <p>16 Q. Do you know if it reaches a level -- a</p> <p>17 thickness where it's safe to walk on?</p> <p>18 A. I do not.</p> <p>19 Q. What is a safe thickness of ice to walk</p> <p>20 upon?</p> <p>21 A. I don't know.</p> <p>22 Q. Do you think it's ever safe to walk on ice?</p> <p>23 A. Sure.</p> <p>24 Q. Okay. And do you know when the ice went out</p> <p>25 in the area of Falls Park in 2018?</p>	<p style="text-align: right;">Page 167</p> <p>1 foam is covering the rocks, that that creates a</p> <p>2 hazard; is that correct? I just want to understand</p> <p>3 what you're saying.</p> <p>4 A. Well I think it's an open and obvious</p> <p>5 hazard.</p> <p>6 Q. Okay.</p> <p>7 A. I think it's readily apparent that the edge</p> <p>8 of the river is jagged, it's difficult to predict</p> <p>9 where that is, you -- it's difficult to predict, if</p> <p>10 you were to stand on the edge of that rocky ledge,</p> <p>11 whether that edge would give out from underneath you.</p> <p>12 Q. So it is a hazard, it's just one that people</p> <p>13 could see and do something about.</p> <p>14 A. That's right.</p> <p>15 Q. Is that correct?</p> <p>16 So if the foam covers the rock that does</p> <p>17 constitute a hazard, but one that you consider to be</p> <p>18 an open and obvious one; true?</p> <p>19 A. Well both hazards are open and obvious.</p> <p>20 Q. The rock, and the foam covering the rock.</p> <p>21 A. That's correct.</p> <p>22 Q. Okay. Now here's a question for you. Lakes</p> <p>23 around here freeze over. Are you aware of that? You</p> <p>24 don't know?</p> <p>25 A. I won't dispute that.</p>
<p style="text-align: right;">Page 166</p> <p>1 A. When the ice what?</p> <p>2 Q. Went out. Do you know what that term means?</p> <p>3 A. Is that a South Dakota term for --</p> <p>4 Q. It's an Upper Midwest term for when the ice</p> <p>5 is no longer present on water.</p> <p>6 A. Sure. Okay.</p> <p>7 Q. When did it go out?</p> <p>8 A. I have no idea.</p> <p>9 Q. Okay.</p> <p>10 A. But whether --</p> <p>11 Q. Do you know what --</p> <p>12 A. If there --</p> <p>13 Q. I'm asking -- I'll ask a couple questions.</p> <p>14 A. Sure.</p> <p>15 Q. Do you know what the coldest temperature was</p> <p>16 in the month of March in Sioux Falls in 2018?</p> <p>17 A. I do not know.</p> <p>18 Q. And you acknowledge that the rocky ledge is</p> <p>19 a hazard; correct?</p> <p>20 A. Yes.</p> <p>21 Q. And you acknowledge that if the water is</p> <p>22 under -- in the river, that's a hazard; --</p> <p>23 A. Yes.</p> <p>24 Q. -- right?</p> <p>25 But you will not acknowledge that if the</p>	<p style="text-align: right;">Page 168</p> <p>1 Q. Isn't -- Okay.</p> <p>2 And that happens every single solitary year,</p> <p>3 they freeze.</p> <p>4 A. Okay.</p> <p>5 Q. And around here they put up signs early in</p> <p>6 the season saying, don't go on the ice.</p> <p>7 A. Okay.</p> <p>8 Q. Can you think of any reason why they would</p> <p>9 need to do that?</p> <p>10 A. Well I would assume because the -- it's</p> <p>11 difficult to determine, from looking at the surface of</p> <p>12 the ice, how thick the ice is and whether it would</p> <p>13 support your weight.</p> <p>14 Q. You're assuming that.</p> <p>15 A. Not having --</p> <p>16 Q. You're guessing.</p> <p>17 A. -- analyzed, you know, those kinds of things</p> <p>18 and how much thickness, from my experience looking at</p> <p>19 ice, I can imagine that it might be difficult to -- to</p> <p>20 determine the thickness of the ice and -- and whether</p> <p>21 the -- it's dense enough to support one's weight.</p> <p>22 Q. I guess my point was: Aren't there</p> <p>23 occasions, sir, where it's still prudent and</p> <p>24 appropriate to issue a warning to people, even when</p> <p>25 the hazard they might encounter is open and obvious?</p>

<p style="text-align: right;">Page 169</p> <p>1 A. Well, on one hand you might think that you 2 cannot have too many warnings. If there's -- If 3 someone could get injured with this product or in this 4 environment, then it could be helpful to provide a 5 warning about that. On the other hand, if you have 6 warnings about -- you know, for every situation, then 7 you can have too many warnings and people will ignore 8 all of them. So it's important to be judicious about 9 what warnings you put up.</p> <p>10 Q. Haven't you in fact testified in cases where 11 you opined that it was necessary to provide a warning 12 notwithstanding the fact that the hazard at issue was 13 open and obvious?</p> <p>14 A. Not that I recall.</p> <p>15 Q. Do you recall testifying in the Yglesias 16 case?</p> <p>17 A. Yglesias, yes.</p> <p>18 Q. That yellow caution tape was needed to warn 19 Ms. Yglesias of the edge of a deck where the railing 20 had been removed?</p> <p>21 A. Yeah, and that's because there's expectation 22 for a railing, and they removed the railing.</p> <p>23 Q. And it wasn't open --</p> <p>24 A. So this is --</p> <p>25 If I could finish?</p>	<p style="text-align: right;">Page 171</p> <p>1 Q. Right. And --</p> <p>2 A. So the explanation for that, if I can 3 finish, --</p> <p>4 Q. Sure.</p> <p>5 A. -- because you seem to be really interested 6 in this, is the entrance to the deck from the driveway 7 it -- is where the yellow caution tape was, but they 8 did not provide a lock on a door and so it was 9 possible to come out the front door and encounter the 10 missing railing, which is why the -- the -- you know, 11 you needed a warning, you know, at that location to 12 show that there is a missing railing here, or there's 13 -- there's something that you should pay attention to. 14 And that's why the caution tape at the entrance to the 15 deck was insufficient, because -- because they hadn't 16 addressed the -- the actual hazard, which is 20, 30 17 feet away.</p> <p>18 Q. But was still in plain sight.</p> <p>19 A. Well it was absence of sight. You know, 20 given the expectation for a railing, then we don't 21 notice when it's gone. You know, it takes four to 16 22 times longer to -- to notice something that is counter 23 to one's expectation than it is to notice something 24 that is consistent with your expectation.</p> <p>25 Q. Even though it was at her own home.</p>
<p style="text-align: right;">Page 170</p> <p>1 Q. Please.</p> <p>2 A. You know, so this is a deck that on that 3 side was maybe 6 to 8 feet above the ground, and so at 4 issue there, as these people were familiar with the 5 deck, they had lived there, it is common practice for 6 decks to have railings, and when you -- when you -- 7 when you -- when you get in the way of those 8 expectations, when you do something that counters an 9 expectation in built environment, then you need to 10 provide a warning about it.</p> <p>11 So in that case there was a railing, the 12 people who lived there knew that there was a railing, 13 and for however long I forget in that case, you know, 14 the construction folks removed the railing and that -- 15 that created a hazard, and that's something that 16 should have been warned about because it countered the 17 expectation of people using the area.</p> <p>18 Q. Sure. And in that case there was also a 19 piece of yellow caution tape that was placed across 20 the entrance to the deck which you opined was not 21 enough warning to tell this woman that a railing that 22 had been removed from a deck constituted a hazard.</p> <p>23 A. Right, --</p> <p>24 Q. True?</p> <p>25 A. -- because they're two different places.</p>	<p style="text-align: right;">Page 172</p> <p>1 A. Especially because it's at her own home.</p> <p>2 Q. Well -- And it's -- your opinion in that 3 case has -- is consistent with your belief that one of 4 the main purposes of warnings is to inform users about 5 the presence of a hazard of which they may not be 6 aware.</p> <p>7 A. Yes.</p> <p>8 Q. And you continue to hold that belief; 9 correct?</p> <p>10 A. Yes.</p> <p>11 Q. And if a person is not aware of a hazard, a 12 warning may be called for; correct?</p> <p>13 A. That's correct.</p> <p>14 Q. And the warning needs to comply with certain 15 basic, fundamental principles of human-factors 16 engineering; correct?</p> <p>17 A. In order to be effective, yes.</p> <p>18 Q. In order to be effective; correct?</p> <p>19 A. Yes.</p> <p>20 Q. All right. One of which is it needs to be 21 close temporally to the hazard itself; correct?</p> <p>22 A. Yes.</p> <p>23 Q. And it needs to specifically warn of the 24 hazard at issue; correct?</p> <p>25 A. Yes.</p>

<p style="text-align: right;">Page 173</p> <p>1 Q. In order to --</p> <p>2 A. If it's a hidden hazard, yes.</p> <p>3 Q. If it's a hidden hazard; --</p> <p>4 A. Right.</p> <p>5 Q. -- correct?</p> <p>6 Or if it's a hazard of which a person may</p> <p>7 not be aware.</p> <p>8 A. Which is a hidden hazard.</p> <p>9 Q. Right. And -- And hazards at -- sometimes</p> <p>10 can be open and at other times cannot; correct?</p> <p>11 A. I don't know what that means.</p> <p>12 Q. Okay. Well if you have a roller coaster</p> <p>13 which has part of the roller coaster at the bottom</p> <p>14 where the people are upside down and their legs are</p> <p>15 hanging down, --</p> <p>16 A. Right.</p> <p>17 Q. -- the fact that their legs are hanging down</p> <p>18 would be open and obvious to someone when they go --</p> <p>19 the roller coaster goes through that part of the</p> <p>20 roller coaster.</p> <p>21 A. If you had actually read that paper, I</p> <p>22 actually had maybe three or four papers about that</p> <p>23 same case, and it is not an obvious hazard because</p> <p>24 people think about roller coasters as the cars on top</p> <p>25 of the track, and at issue in that particular case was</p>	<p style="text-align: right;">Page 175</p> <p>1 people who come to Falls Park during February or March</p> <p>2 may interpret the white foam stuff -- white stuff as</p> <p>3 being?</p> <p>4 A. Have I done any studies?</p> <p>5 Q. Yeah.</p> <p>6 A. No.</p> <p>7 Q. Okay. Have you done any studies to analyze</p> <p>8 whether or not people approach the white stuff on the</p> <p>9 river during the February and March months at Falls</p> <p>10 Park?</p> <p>11 A. No.</p> <p>12 Q. So whether or not the white stuff that</p> <p>13 accumulates below the falls at Falls Park every year</p> <p>14 in February or March con -- attracts people closer to</p> <p>15 the bank is not something that you've conducted any</p> <p>16 scientific study of; is that correct?</p> <p>17 A. Well I think you're mischaracterizing what I</p> <p>18 said about understanding this pile of white stuff as</p> <p>19 snow and -- and wondering how that could come about.</p> <p>20 So that pile of snow is -- you know, did not -- or a</p> <p>21 -- pile of white stuff did not occur without a</p> <p>22 context, and the context in this case is, at least</p> <p>23 from the photographs that I've seen, there were very</p> <p>24 few places that had any snow, and those patches of</p> <p>25 snow were very small. So given that, and -- and</p>
<p style="text-align: right;">Page 174</p> <p>1 that it is an inverted roller coaster and people don't</p> <p>2 think about inverted roller coasters when they think</p> <p>3 about roller coasters, even if they've just gotten off</p> <p>4 of an inverted roller coaster.</p> <p>5 So in that case it was a nonobvious hazard</p> <p>6 because we -- you know, in this case the track was,</p> <p>7 you know, 10, 12 feet above the ground, and if you</p> <p>8 think about roller coasters as riding on top of the</p> <p>9 track, then there's no indication that one could get</p> <p>10 injured by walking underneath the roller coaster</p> <p>11 track, and therefore, a specific hazard needs to be</p> <p>12 provided.</p> <p>13 Q. Okay. Some people think roller coasters</p> <p>14 that people ride on top. Some people may think that</p> <p>15 piles of white stuff might be snow. True?</p> <p>16 A. I actually did research to find out how</p> <p>17 people think about roller coasters, so I know that 75</p> <p>18 percent, maybe 78 percent of the people that I</p> <p>19 surveyed thought about roller coaster tracks riding on</p> <p>20 -- I'm sorry, roller coaster trains riding on top of</p> <p>21 the track and not underneath, even though all of those</p> <p>22 people had ridden an inverted roller coaster before.</p> <p>23 I have not done any studies to evaluate what set of</p> <p>24 visual stimuli might be interpreted as snow or not.</p> <p>25 Q. Have you done any studies to interpret what</p>	<p style="text-align: right;">Page 176</p> <p>1 knowing what I know about the incidence of foam</p> <p>2 buildup in that area and maybe some other areas of the</p> <p>3 river, then it's not likely that there would be -- I'm</p> <p>4 sorry, I'm phrasing that wrong.</p> <p>5 Because there was only small patches of snow</p> <p>6 in -- in a few places in the park according to</p> <p>7 photographs I've seen, it seems hard to imagine how</p> <p>8 someone would see a pile of white stuff and somehow</p> <p>9 think that was a big pile of snow. That pile of snow</p> <p>10 is 10 to 20 feet tall, and I don't see any other piles</p> <p>11 of snow anywhere else on the grounds. Why would I</p> <p>12 think there would be snow there? So that's my</p> <p>13 question.</p> <p>14 So questions about, you know, have I done</p> <p>15 any research on how people interpret a big pile of</p> <p>16 white stuff would not be the study that I would do, it</p> <p>17 would be, you know, interpreting a big pile of white</p> <p>18 stuff in the context of -- of very little, if any,</p> <p>19 snow on the ground.</p> <p>20 Q. Moving on.</p> <p>21 You take issue with Ms. Gill's opinion that</p> <p>22 the foam attracts children and people to the river</p> <p>23 bank. Is that a fair statement, that you take issue</p> <p>24 with that?</p> <p>25 A. I take issue in it that she failed to</p>

Page 177

1 provide any evidence.

2 Q. I just asked you a question, a very simple
3 question.

4 Do you take issue with it or not?

5 A. It's not a simple question, actually.

6 Q. Sure, it is.

7 A. No. And she can say whatever she wants, but
8 the issue that I have with that statement from Ms.
9 Gill is she makes the statement without providing any
10 evidence besides some anecdotal evidence.

11 Q. Okay. Do you believe, or not believe, in
12 your opinion, that the presence of foam in Falls Park
13 during the months of February and March on an annual
14 basis attracts people closer to the river bank?

15 A. I have no idea if that's true or not.

16 Q. Okay. So you have no opinion one way or
17 another as to whether or not the foam acts as an-- as
18 an attractant to children; is that correct?

19 A. I'd have to go with what -- with the same
20 questions posed to various city staff, park staff, and
21 -- and they answer the question I don't see that the
22 foam is a particular attractant, so --

23 Q. That is --

24 A. -- so that's -- that's the evidence that I
25 have. They don't see that foam is a particular

Page 178

1 attractant at least before the 2018 incident.

2 Q. All right.

3 A. And, you know, that's the only information I
4 have.

5 Q. According --

6 A. I don't have any information that it is an
7 attractant or is not.

8 Q. You have no opinion one way or another; is
9 that fair?

10 A. Sure.

11 Q. All right. In rebutting Ms. Gill's opinion,
12 you take issue with what you call her lack of
13 evidence; correct?

14 A. Yes.

15 Q. And then you point out that Mr. Mieras
16 stated that in all his time in -- with Falls Park the
17 only time he has heard or seen -- seen or heard of
18 children playing with the foam was the 2018 incident;
19 correct?

20 A. Yes.

21 Q. You cite no other anecdotal evidence in your
22 report for that proposition that it does not
23 constitute an attractant.

24 A. Yeah. I don't -- I guess I don't -- I think
25 that the --

Page 179

1 My recollection is that when the same
2 question has been posed to various people, they all
3 say pretty much the same thing. They don't see the
4 snow as an attractant. So I did not see the need to
5 belabor the point; these people thought it was an
6 attractant, this person said it was an attractant, you
7 know, the -- the -- from my reading of these
8 statements and transcripts it seems that the bulk of
9 the people, you know, the -- consider the question of
10 foam as an attractant to be -- I don't know, a ques --
11 What's the right word? They're surprised by the
12 question. It's like, why would that question even
13 come up. So -- So yeah, I didn't feel the need to
14 expand on that.

15 Q. So you didn't feel the need to provide the
16 entire basis of your rebuttal to Ms. Gill?

17 A. List all the pros and cons? No.

18 Q. Well, no. You said that one of the reasons
19 you don't agree with Ms. Gill is because city
20 personnel told you they don't believe it's an
21 attractant, and then you cite to one guy. If there
22 are more people who told you that, don't you think you
23 should tell me who those people are so I can ask them?

24 A. Well you're -- you're -- you have the same
25 information I do in terms of statements and deposition

Page 180

1 transcripts. Ms. Gill provides -- you know, if she
2 had such information you would think that it would be
3 provided in her report. She goes on and on about foam
4 as a hazard, but says very little about foam as an
5 attractant. So that tells me there are very few
6 statements about foam as an attractant, otherwise she
7 would have listed them.

8 Q. Do you know if the City of Sioux Falls
9 considers the foam to attract visitors even closer to
10 the edge of the river?

11 A. Again, it's not clear to me that foam is an
12 attractant, period, so.

13 Q. I asked if -- do you know if the City of
14 Sioux Falls itself, not you, --

15 A. Umm-hmm?

16 Q. -- but if the City of Sioux Falls considers
17 the foam to be something that attracts visitors even
18 closer to the edge of the water?

19 A. Again, from my reading of these deposition
20 transcripts, I would say no.

21 Q. How about your reading of all the materials
22 that were provided to you?

23 A. The same, same answer. No.

24 Q. You believe --

25 You don't believe that the city has ever

<p style="text-align: right;">Page 181</p> <p>1 indicated that they believe that the foam attracts 2 people even closer to the river's edge; is that your 3 testimony today?</p> <p>4 A. No. After the 2018 incident I think the -- 5 the city began to, you know, entertain the -- the 6 thought that foam might be an attractant, but I don't 7 think that, you know, was much of a blip on their 8 consciousness before the 2018 incident.</p> <p>9 Q. That's not what I asked you. I asked you if 10 the city considers that the foam serves as something 11 that attracts people even closer to the river's edge.</p> <p>12 A. I think that --</p> <p>13 My understanding is now, after the 2018 14 incident, the city might consider that as an option.</p> <p>15 Q. Isn't it true Detective Bakke has testified 16 that the foam obscured the ledge where Maggie was 17 standing?</p> <p>18 A. Yeah. We've talked about that.</p> <p>19 Q. Okay. And you disagree with his conclusion 20 as to whether or not it obscured the rocky ledge?</p> <p>21 A. No. As we talked about, he was -- he was 22 mentioning a lower ledge and not the upper ledges, and 23 he clarified that for me on June 11th.</p> <p>24 Q. When you went to the -- the site, to Falls 25 Park in 2019 in June, would you characterize the park</p>	<p style="text-align: right;">Page 183</p> <p>1 that was present in the park in March 2018, at least 2 as it's been represented to me. Okay?</p> <p>3 A. Yes.</p> <p>4 Q. And did you see similar signs or identical 5 signs when you were there?</p> <p>6 A. Yes.</p> <p>7 Q. All right. How many did you see in the park 8 total?</p> <p>9 A. I walked the whole park, so however many 10 they have there, I probably saw all of them.</p> <p>11 Q. Okay. Do you know how many that is?</p> <p>12 A. I have not counted them.</p> <p>13 Q. Do you know the route that the party took 14 from the parking lot to the ultimate site where Maggie 15 Zaiger lost her life?</p> <p>16 A. I believe there's conflicting testimony 17 about the route they took from the parking lot to the 18 Observation Tower, but it's consistent testimony about 19 the route they took from the tower to the incident 20 site. So I know the most likely route that they would 21 have taken from the parking lot to the tower, and I 22 know the most likely route they would have taken from 23 the tower to the incident site. And the most likely 24 route from the tower to the incident site is confirmed 25 by testimony from Ms. Melendez and Ms. Jayne.</p>
<p style="text-align: right;">Page 182</p> <p>1 as a wilderness area, or an urban park, or something 2 else?</p> <p>3 A. I would not classify it as a urban area. 4 I'm sorry, as a wilderness area. There's a specific 5 characteris -- characteristics that an area needs to 6 have before being quali -- noted a wilderness area.</p> <p>7 But as I stated in my report, it's a natural 8 area. You know, the river and the surrounding rocky 9 edges, it's a natural area embedded in an urban park.</p> <p>10 Q. And have you ever seen guarding of any type 11 at a natural area in an urban setting featuring a 12 river?</p> <p>13 A. I'm sorry. Ask that again.</p> <p>14 Q. In other words, have you been to an urban 15 area where there is rivers?</p> <p>16 A. Yes.</p> <p>17 Q. Have you ever seen guarding at those sites, 18 such as railings, barriers, fences?</p> <p>19 A. I don't recall.</p> <p>20 Q. Have you been to Minneapolis before?</p> <p>21 A. No.</p> <p>22 Q. I'm going to show you what's marked as 23 Exhibit 19, and now I want to talk to you about the 24 warning signs. This is in fact the warning sign -- 25 depiction of the warning -- one of the warning signs</p>	<p style="text-align: right;">Page 184</p> <p>1 Q. You state -- and who --</p> <p>2 And both of them also testified they didn't 3 see any warning sign on their route; isn't that 4 correct?</p> <p>5 A. That's correct.</p> <p>6 Q. And do you give their testimony on that 7 credence, or do you disregard it?</p> <p>8 A. It would not surprise me that there would be 9 people that would not notice this sign.</p> <p>10 Q. I'm asking you in this particular instance 11 do you give their testimony credence, or have you 12 disregarded it?</p> <p>13 A. Their testimony that they did not see the 14 signs?</p> <p>15 Q. Correct.</p> <p>16 A. I have no reason to believe that they did 17 not see the sign, and if they say they didn't see it 18 or say they don't recall it, I have no reason to 19 believe otherwise.</p> <p>20 Q. Well which way did they testify. that they 21 don't recall, or they didn't see it?</p> <p>22 A. Well, they said they don't re -- they didn't 23 see it, but in actuality it's a recollection, so --</p> <p>24 Q. Well --</p> <p>25 A. -- it could be one or the both.</p>

<p style="text-align: right;">Page 185</p> <p>1 Q. Everything in life is a recollection when we</p> <p>2 go backwards; isn't it, doctor?</p> <p>3 A. Of course.</p> <p>4 Q. You read Courtney Jayne's deposition</p> <p>5 transcript last night; right?</p> <p>6 A. Yes.</p> <p>7 Q. She was asked if -- the route she remembers</p> <p>8 taking over from the Observation Tower to where Maggie</p> <p>9 died; right?</p> <p>10 A. Yes.</p> <p>11 Q. She was asked if she saw a sign on the way;</p> <p>12 right?</p> <p>13 A. Yes.</p> <p>14 Q. What did she say?</p> <p>15 A. No.</p> <p>16 Q. Did she say she didn't recall if she saw it</p> <p>17 or not, or did she say, no, I didn't see one?</p> <p>18 A. Well I believe that she said no, she didn't</p> <p>19 see it.</p> <p>20 Q. All right. What did --</p> <p>21 A. But from a human factors standpoint that can</p> <p>22 mean one of at least two things. One is in fact she</p> <p>23 did not see it, and the other is she did not remember</p> <p>24 seeing it. She saw it, but doesn't remember it, and</p> <p>25 so in her mind she did not see it. So either one</p>	<p style="text-align: right;">Page 187</p> <p>1 Q. All right. So can you state, to a</p> <p>2 reasonable degree of certainty, that it's your opinion</p> <p>3 she did see it and simply doesn't remember?</p> <p>4 A. No.</p> <p>5 Q. All right.</p> <p>6 A. I'm saying that's a possibility.</p> <p>7 Q. So your --</p> <p>8 The possibility is pure speculation; is it</p> <p>9 not?</p> <p>10 A. It's not speculation, because it's based on</p> <p>11 research that people pass by warning signs. We know</p> <p>12 they pass by them, we know that they looked at them,</p> <p>13 and yet when stopped and asked do you remember seeing</p> <p>14 any signs, they say no.</p> <p>15 Q. Are you prepared --</p> <p>16 Do you have any facts to testify that</p> <p>17 Courtney Jayne looked at one of these signs?</p> <p>18 A. I don't know one way or the other.</p> <p>19 Q. All right. So to testify that she looked at</p> <p>20 it would be pure speculation on your part. "Yes"?</p> <p>21 Well if you don't know, you'd be guessing.</p> <p>22 A. Well we don't know --</p> <p>23 Q. All right. So --</p> <p>24 A. -- if she looked at it or not. And I cannot</p> <p>25 say in any way that I know that she looked at it,</p>
<p style="text-align: right;">Page 186</p> <p>1 could be true.</p> <p>2 Q. If she saw it, as you think might be</p> <p>3 possible, which is speculation; isn't it?</p> <p>4 A. Based on research.</p> <p>5 Q. Can you say, to a reasonable degree of</p> <p>6 certainty within your field, that Courtney Jayne saw</p> <p>7 one of the signs on her way from the Observation Tower</p> <p>8 to where Maggie Zaiger died?</p> <p>9 A. No.</p> <p>10 Q. All right. Can you say, to a reasonable</p> <p>11 degree of certainty within your field of expertise,</p> <p>12 that Crissy Melendez saw a sign, a warning sign from</p> <p>13 the Observation Tower along the path to where Maggie</p> <p>14 Zaiger ultimately died?</p> <p>15 A. I would be surprised if they saw a sign from</p> <p>16 the tower to the incident site.</p> <p>17 Q. Along the path?</p> <p>18 A. From the tower to the incident site? Yeah.</p> <p>19 There are no signs there.</p> <p>20 Q. Can you state, to a reasonable degree of</p> <p>21 certainty within your field of expertise, that Crissy</p> <p>22 Melendez saw a warning sign of the type depicted in</p> <p>23 the exhibit in front of you while she was at Falls</p> <p>24 Park?</p> <p>25 A. Well she said she did not see it.</p>	<p style="text-align: right;">Page 188</p> <p>1 because I don't.</p> <p>2 Q. All right.</p> <p>3 THE WITNESS: Can we take a break now?</p> <p>4 MR. SIEFF: Sure.</p> <p>5 THE REPORTER: Off the record, please.</p> <p>6 (Recess taken from 2:07 to 2:11 p.m.)</p> <p>7 BY MR. SIEFF:</p> <p>8 Q. Doctor, one of -- one of your other opinions</p> <p>9 is that Maggie's mother adequately super --</p> <p>10 inadequately -- Strike that.</p> <p>11 You take issue with Ms. Gill's opinion that</p> <p>12 Maggie's mother adequately supervised Maggie; correct?</p> <p>13 A. Yes.</p> <p>14 Q. And in fact it's your opinion that Maggie's</p> <p>15 mother failed to adequately supervise Maggie; is that</p> <p>16 correct?</p> <p>17 A. That's correct.</p> <p>18 Q. Basically you're saying that Courtney failed</p> <p>19 her duty as a parent; correct?</p> <p>20 A. I'm just saying that there's evidence that</p> <p>21 -- that Ms. Jayne failed to adequately monitor Maggie.</p> <p>22 Q. And you're saying that she is in whole or in</p> <p>23 part responsible for the death of her own child; isn't</p> <p>24 that correct?</p> <p>25 A. I think the failure to monitor Maggie was a</p>

<p style="text-align: right;">Page 189</p> <p>1 causal factor in Maggie's death.</p> <p>2 Q. And consequently, Ms. Jayne, who you accuse</p> <p>3 of failing to adequately supervise Maggie, would be</p> <p>4 the person responsible for Maggie's death; true?</p> <p>5 A. Well, I guess I have trouble with your</p> <p>6 characterization.</p> <p>7 Q. I'm sure you do because you'd like to keep</p> <p>8 it nice and sterile, wouldn't you? But the reality of</p> <p>9 it is when you say Courtney Jayne failed to</p> <p>10 adequately supervise her child and she died, what</p> <p>11 you're saying is she's responsible for her death.</p> <p>12 Isn't that the reality here?</p> <p>13 A. I can --</p> <p>14 I can understand that, yes.</p> <p>15 Q. That's an awfully serious thing to say;</p> <p>16 isn't it, sir?</p> <p>17 A. It is a serious matter.</p> <p>18 Q. And it's something that you are saying in</p> <p>19 your capacity as a human factors engineer and an</p> <p>20 experimental psychologist; correct?</p> <p>21 A. Yes.</p> <p>22 Q. With no expertise in child care; correct?</p> <p>23 Correct?</p> <p>24 A. Well, I think that -- I've laid out the</p> <p>25 bases for my opinions --</p>	<p style="text-align: right;">Page 191</p> <p>1 Q. And you have looked at all the available</p> <p>2 evidence.</p> <p>3 A. Yes.</p> <p>4 Q. And I'd assume you'd want to reach that kind</p> <p>5 of opinion based on sound facts, sound science and</p> <p>6 sound experience and expertise; correct?</p> <p>7 A. Yes.</p> <p>8 Q. One of the facts that you base your opinion</p> <p>9 on is by observation you made while you were at Falls</p> <p>10 Park on June 11, 2019; correct?</p> <p>11 A. Yes.</p> <p>12 Q. And during that time you state you observed</p> <p>13 groups with young children to determine how closely</p> <p>14 the accompanying adults monitored the children;</p> <p>15 correct?</p> <p>16 A. Yes, and how close --</p> <p>17 Q. And you photo --</p> <p>18 A. -- the children got to the river.</p> <p>19 Q. And you photographed the young children that</p> <p>20 you observed; correct?</p> <p>21 A. Yes.</p> <p>22 Q. Did you get permission to photograph</p> <p>23 children at Falls Park?</p> <p>24 A. I did not.</p> <p>25 Q. All right. Did you ask their parents if it</p>
<p style="text-align: right;">Page 190</p> <p>1 Q. And you've said you're not an expert in</p> <p>2 child care.</p> <p>3 A. -- and monitoring children is part of child</p> <p>4 care.</p> <p>5 Q. You would want to be extremely careful and</p> <p>6 thorough before you make the kind of charge that a</p> <p>7 parent is responsible for their own child's death;</p> <p>8 true?</p> <p>9 A. Yes.</p> <p>10 Q. It'd be a terrible thing to say that about a</p> <p>11 parent and then find out you're wrong; wouldn't it?</p> <p>12 A. Yes.</p> <p>13 Q. You know, if you're wrong about this you</p> <p>14 know what happens to you; nothing? Do you know what</p> <p>15 happens to her? Do you?</p> <p>16 A. I can imagine it would be a terrible thing.</p> <p>17 Q. Tell me what you think happens to her if you</p> <p>18 are wrong in your accusation that she's responsible</p> <p>19 for her own child's death.</p> <p>20 A. I think this is beyond the scope of my</p> <p>21 expertise.</p> <p>22 Q. I'd assume you'd want to make sure you've</p> <p>23 looked at all the available evidence before you make</p> <p>24 that kind of accusation; true?</p> <p>25 A. I have.</p>	<p style="text-align: right;">Page 192</p> <p>1 was okay if you took photographs of minors?</p> <p>2 A. I did not.</p> <p>3 Q. And you observed eight different groups with</p> <p>4 26 children; correct?</p> <p>5 A. If that's what I wrote, yes.</p> <p>6 Q. That's what you wrote.</p> <p>7 A. Okay.</p> <p>8 Q. And that's one of the bases of your opinion;</p> <p>9 is it not?</p> <p>10 A. Yes.</p> <p>11 Q. Your observations. One of the factual</p> <p>12 underpinnings of this accusation you make; isn't it?</p> <p>13 A. One of them, yes.</p> <p>14 Q. All right. And I want you to answer a few</p> <p>15 questions, preferably directly.</p> <p>16 The 26 children; how old were they?</p> <p>17 A. Well it's difficult to --</p> <p>18 Q. You don't know; do you?</p> <p>19 A. -- determine, but from observation they</p> <p>20 appeared to be as young as maybe three or four, and as</p> <p>21 old as maybe 10'ish, maybe 12.</p> <p>22 Q. How close did you get to the children?</p> <p>23 A. Well the closest was pro --</p> <p>24 Yeah. I have no idea.</p> <p>25 Q. You were --</p>

<p style="text-align: right;">Page 193</p> <p>1 A. Maybe a hundred or a couple hundred feet 2 away. 3 Q. -- a couple hundred feet away maybe. You 4 were far enough away that you couldn't tell whether or 5 not these adults were giving verbal instructions to 6 the children; were you? 7 A. That's correct. 8 Q. Isn't it true that verbal instructions can 9 be an adequate form of supervision of a child? 10 A. It can be. 11 Q. Isn't that what the law of South Dakota 12 says? 13 A. I don't know. 14 Q. You never bothered to look; did you? 15 A. It's not within my domain of expertise. 16 Q. Isn't it true that the law of the State of 17 South Dakota permits daycare centers to utilize vocal 18 or verbal instruction as a part of adequate 19 supervision, sir? 20 A. Yes -- 21 Q. Okay. 22 A. -- verbal instruction is certainly one way 23 to monitor. 24 Q. All right. 25 A. And it appeared as if some of the adults in</p>	<p style="text-align: right;">Page 195</p> <p>1 A. I think it's irrelevant because in all the 2 cases the children were staying away from the river, 3 however that came about, and the -- and the adults 4 were staying close to the children, however that came 5 about. So whether they are -- they were doing -- 6 having verbal interactions or not is irrelevant 7 because the behavior shows the children stayed away 8 from the river. 9 Q. You went to Falls Park in June when there 10 was no foam; right? 11 A. Not piles of foam. 12 Q. There was no foam in piles below the river; 13 correct? 14 A. Right. There were -- There was -- 15 Q. You've already tes -- 16 A. -- foam gathered in nooks and crannies along 17 some parts of the river. 18 Q. You've already testified that the conditions 19 that existed when you were there were not 20 substantially similar to what existed on March 18, 21 2018, and you agree that the conditions were not 22 substantially similar. 23 A. The conditions in terms of the foam and the 24 snow. 25 Q. And you saw eight groups of 26 children, you</p>
<p style="text-align: right;">Page 194</p> <p>1 the -- in the scenes that I saw were using verbal -- 2 Q. You wrote -- 3 A. -- instructions as a way to monitor their 4 children. 5 Q. You're saying it appears that it did? 6 A. Yes. 7 Q. You wrote, quote, given my distance from the 8 groups I could not determine whether the adults used 9 verbal -- used vocal instruction to keep the children 10 close to them and away from the river, or whether the 11 children had already learned to maintain a safe 12 distance from the river. 13 A. That's right. 14 Q. Okay. Now you're telling me it appeared to 15 you that they were using vocal instructions. 16 A. Yeah. One of the exhibits in my report 17 shows a pair of adults who are on a wall above where 18 their child was standing, or was playing, and there 19 was multiple looks back and forth, some kind of 20 exchange was going on. 21 Q. That's not what you bothered to write, 22 though; is it? 23 A. Well -- 24 Q. You wrote specifically you couldn't tell if 25 they were using vocal instructions.</p>	<p style="text-align: right;">Page 196</p> <p>1 don't know their ages; correct? You don't -- 2 A. I can estimate their ages. 3 Q. Do you know where they were from? 4 A. I do not. 5 Q. Do you know whether they were with 6 parents -- 7 A. I do not. 8 Q. -- or child care people? 9 A. I do not. 10 Q. Or daycare people? 11 A. That's why I was I think careful to say the 12 adults that were accompanying the child -- children. 13 Q. Okay. Do you know if they'd been to the 14 park before? 15 A. I do not. 16 Q. Do you know if they'd been to -- 17 Do you know if they knew how to swim? 18 A. I do not. 19 Q. Do you know anything at all about these 20 children? 21 A. Nothing other than what I captured in the 22 photographs. 23 Q. Or the adults. Do you know anything at all 24 about the adults who were there? 25 A. Other than what was captured in the</p>

<p style="text-align: right;">Page 197</p> <p>1 photographs, no.</p> <p>2 Q. Are you going to testify in open court under</p> <p>3 oath that you considered this to be a valid scientific</p> <p>4 study of some sort?</p> <p>5 A. I did not present this as a scientific</p> <p>6 study.</p> <p>7 Q. This is --</p> <p>8 A. I presented this as a demonstration of</p> <p>9 behavior of adults and children in the park on the day</p> <p>10 that I was there and was able to observe.</p> <p>11 Q. Nowhere in your --</p> <p>12 A. I don't think I've ever said that this was a</p> <p>13 empirical study. But as a demonstration I think -- I</p> <p>14 think that it's -- if I were to do statistical</p> <p>15 analyses -- I know that if I were to do like a</p> <p>16 Chi-Square test on the data, I would find that there</p> <p>17 was -- have significant findings of children staying</p> <p>18 away from the river.</p> <p>19 Q. Well you didn't do that before you accused</p> <p>20 Courtney Jayne of being responsible for her child's</p> <p>21 death; did you?</p> <p>22 A. No need to because I've done Chi-Squared --</p> <p>23 Q. And you didn't --</p> <p>24 A. If I could finish.</p> <p>25 Because I've done Chi-Square tests, I know</p>	<p style="text-align: right;">Page 199</p> <p>1 Q. Three or four or maybe five?</p> <p>2 A. More likely even less than three.</p> <p>3 Q. Or six?</p> <p>4 A. They were quite close, which is --</p> <p>5 Q. Did you measure them?</p> <p>6 A. You know, if you keep --</p> <p>7 Stop interrupting me and maybe I can finish</p> <p>8 the sentence.</p> <p>9 But you can determine, by looking at the</p> <p>10 photographs, that all the -- that each child had an</p> <p>11 adult that was close, you know, within arm's distance</p> <p>12 or within taking one step.</p> <p>13 Q. You say most of the time there was an adult</p> <p>14 positioned between the young child and the river.</p> <p>15 A. Yes.</p> <p>16 Q. That would, by implication, mean that some</p> <p>17 of the times there was not.</p> <p>18 A. And -- which --</p> <p>19 Which does not mean that the adult was not</p> <p>20 monitoring the child, it means that the adult might</p> <p>21 have been on the other side of the child from the</p> <p>22 river, but within reach.</p> <p>23 Q. So when you wrote, most of the time there</p> <p>24 was an adult positioned between the young child and</p> <p>25 the river, --</p>
<p style="text-align: right;">Page 198</p> <p>1 that if you have zero instances of an event with 26 --</p> <p>2 zero instances of a frequency of one event out of the</p> <p>3 possible, you know, 26 in this case, then I would find</p> <p>4 a statistical significance using a Chi-Square test.</p> <p>5 Q. Do you really think a first-year student at</p> <p>6 Santa Cruz in this experimental psychology department</p> <p>7 could get away with calling this some sort of valid</p> <p>8 test to -- to evidence a theory, as basis for</p> <p>9 establishing a theory or hypothesis? Is that what</p> <p>10 you're going to say in court?</p> <p>11 A. Again, I've never represented that this --</p> <p>12 this observational study was something maybe, you</p> <p>13 know, worthy of publication.</p> <p>14 Q. You did not --</p> <p>15 A. It shows --</p> <p>16 Q. -- call this --</p> <p>17 A. -- that of the 26 children there, none of</p> <p>18 them walked within 10 feet of the river.</p> <p>19 Q. What you --</p> <p>20 What you observed was at least one adult was</p> <p>21 no more than a few feet from each younger child;</p> <p>22 right?</p> <p>23 A. Yes.</p> <p>24 Q. What's "a few feet"?</p> <p>25 A. Three or four feet.</p>	<p style="text-align: right;">Page 200</p> <p>1 A. Yes?</p> <p>2 Q. -- you knew full well that some of the time</p> <p>3 there was not an adult positioned between the young</p> <p>4 child and the river. Why didn't you just write that?</p> <p>5 A. Well the -- I think the context of that</p> <p>6 sentence, if I could have my binder back.</p> <p>7 Where did that go?</p> <p>8 Q. It's in your report.</p> <p>9 A. Oh, here it is.</p> <p>10 Q. I just want to know why you didn't write</p> <p>11 that?</p> <p>12 A. I'd like to see the context. Where are you</p> <p>13 reading from?</p> <p>14 Q. I'm reading from your report on page 13.</p> <p>15 A. (Witness reviewing exhibit.) All right. So</p> <p>16 subsection d.ii, "All of the children were closely</p> <p>17 monitored in that at least one adult was no more than</p> <p>18 a few feet from each younger child." And what that</p> <p>19 means is within reach or within a one-step distance.</p> <p>20 Most of the time -- Of those times when there was a</p> <p>21 proximate adult, most of the time that adult was</p> <p>22 between the child and the river. That does not mean</p> <p>23 most of the time there was an adult between the child</p> <p>24 and the river and the other time there was not an</p> <p>25 adult monitoring the child. All of the time there was</p>

<p style="text-align: right;">Page 201</p> <p>1 an adult monitoring the child.</p> <p>2 Q. Nowhere in your report do you refer to this</p> <p>3 observation of a few kids that you conducted on July</p> <p>4 -- June 11, 2019 as a mere demonstrative or</p> <p>5 demonstration of the point. You don't use the word</p> <p>6 "demonstration" anywhere in there.</p> <p>7 A. I just described what I did.</p> <p>8 Q. And then you go on to state that in your</p> <p>9 conclusion Ms. Jayne did not act in a way that would</p> <p>10 be expected of parental supervision and did not act to</p> <p>11 closely monitor her young child, as did other parents</p> <p>12 observed at Falls Park.</p> <p>13 Consequently, isn't it true, sir, that you</p> <p>14 are utilizing your limited observation of a limited</p> <p>15 number of people on a day completely un-similar to the</p> <p>16 date in question as part of the basis for your</p> <p>17 conclusion with respect to adequate or inadequate</p> <p>18 supervision?</p> <p>19 A. Well section 9 -- section 4.e. you have my</p> <p>20 summary statement for that section. So the opinion</p> <p>21 that Ms. Jayne failed to maintain a close distance and</p> <p>22 failed to monitor her child is based on everything</p> <p>23 else I had written in that section 4, section a. and</p> <p>24 b. and c., as well as d. where I describe the -- the</p> <p>25 observational study that I did.</p>	<p style="text-align: right;">Page 203</p> <p>1 Q. And you read what she said about what</p> <p>2 happened that day; correct?</p> <p>3 A. Yes.</p> <p>4 Q. And she said she didn't see any signs from</p> <p>5 the Observation Tower to the point of the death;</p> <p>6 correct?</p> <p>7 A. That's correct.</p> <p>8 Q. And she didn't see any signs from when they</p> <p>9 got to the parking lot to the Observation Tower that</p> <p>10 she considered warning signs; correct?</p> <p>11 A. That's correct.</p> <p>12 Q. And she testified she was reading things</p> <p>13 because she's kind of a history buff; didn't she?</p> <p>14 A. I remember her talking about one thing</p> <p>15 having to do with the mill. So I don't know that that</p> <p>16 would be characterized as stuff, but she did mention</p> <p>17 reading a plaque about the mill.</p> <p>18 Q. She testified when -- that she thought the</p> <p>19 pile in the river was snow; did she not?</p> <p>20 A. Yes.</p> <p>21 Q. You've disregarded her testimony on that;</p> <p>22 haven't you?</p> <p>23 A. No. What makes you say that?</p> <p>24 Q. Because you've said no reasonable and</p> <p>25 attentive person or prudent person could ever think it</p>
<p style="text-align: right;">Page 202</p> <p>1 Q. Very simple question: Number -- item --</p> <p>2 letter d. on page 13.</p> <p>3 A. Yes.</p> <p>4 Q. Does that form part of the basis of your</p> <p>5 opinion with respect to supervision or not?</p> <p>6 A. It does.</p> <p>7 Q. Did you --</p> <p>8 You have not ever spoken to Crissy Melendez;</p> <p>9 correct?</p> <p>10 A. That's correct.</p> <p>11 Q. Do you know if she has any financial</p> <p>12 incentive in this case?</p> <p>13 A. I have no idea.</p> <p>14 Q. Do you know if she has a history of being an</p> <p>15 unreasonable person?</p> <p>16 A. I have no idea.</p> <p>17 Q. Or an inattentive parent?</p> <p>18 A. I have no idea.</p> <p>19 Q. Or a bad parent?</p> <p>20 A. I have no idea.</p> <p>21 Q. Do you know what her background is at all?</p> <p>22 A. Other than what she talked about in her</p> <p>23 deposition.</p> <p>24 Q. Which you read.</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 204</p> <p>1 was snow.</p> <p>2 A. So --</p> <p>3 And I still am puzzled by why she would</p> <p>4 think it was snow.</p> <p>5 Q. Okay. Did you read why she thought it was</p> <p>6 snow?</p> <p>7 A. Something about piling snow up in the middle</p> <p>8 of corn fields or something.</p> <p>9 Q. Is that what she said, piling up in corn</p> <p>10 fields; is that your testimony today?</p> <p>11 A. It was --</p> <p>12 It was something to that effect.</p> <p>13 Q. Well she had a reason for why she thought it</p> <p>14 was piled up.</p> <p>15 A. If I could finish.</p> <p>16 She said something that in Iowa they pile</p> <p>17 snow up in open fields, so.</p> <p>18 Q. Okay.</p> <p>19 A. That's what I recall from her testimony.</p> <p>20 Q. And you thought that was a silly reason for</p> <p>21 thinking the -- the white stuff at the park was snow?</p> <p>22 A. You know, again you're mischaracterizing my</p> <p>23 testimony. I never used the word "silly."</p> <p>24 Q. Unreasonable.</p> <p>25 A. I'm still puzzled by -- by how one could</p>

<p style="text-align: right;">Page 205</p> <p>1 think that was snow, given the context. So, for 2 example, the -- the river's a river, it doesn't -- 3 that river could not be anywhere else except where it 4 was. You know, they walked up to the river, did not 5 encounter a river, so it had to be a river there, not 6 a big field where someone might pile up snow, so -- 7 you know, so that doesn't make sense to me either. 8 Q. It probably doesn't make sense sitting in a 9 conference room in Minnesota, may make sense when 10 you're out at Sioux Falls with a number of kids. 11 I want to ask you about your opinion with 12 respect to the distance of Crissy Melendez and -- when 13 she took this photograph -- a photograph. If you turn 14 to page 12 of your report, you state: "During the 15 site visit, I used my camera to adjust my view to 16 match the view shown in both photos of the children 17 taken by Ms. Melendez." The "exercise indicated that 18 Ms. Melendez was probably standing about 40 feet from 19 the river edge, rather than 10 to 15 feet." 20 Did I read that correctly? 21 A. Yes. 22 Q. Melendez Exhibit Number 4 is one of those 23 photographs; correct? 24 A. Yes. 25 Q. Melendez Exhibit Number 5 is one of those</p>	<p style="text-align: right;">Page 207</p> <p>1 A. Photogrammetry? 2 Q. Yes. 3 A. Yes. 4 Q. And that's the science of making reliable 5 measurements by use of photographs; correct? 6 A. The science of estimating measurements by 7 using photographs. 8 Q. What's your background in that field? 9 A. I have done photogram metric analyses of 10 photographs using measurements of a known o -- or 11 known measurements of an object in the photograph and 12 then extrapolating two objects in the same plane to 13 determine or to estimate measurements for a second 14 object in that photograph. I've also used a software 15 program called PhotoModeler which does the same thing 16 in a much quicker, easier way as long as you have 17 measurements of other features in the scene. 18 Q. Did you use PhotoModeler in this instance? 19 A. No. 20 Q. Did you have any known measurements to 21 utilize in this instance? 22 A. I just -- 23 As I said, I -- I used the method as des -- 24 as I described. 25 Q. What was your error rate regarding the</p>
<p style="text-align: right;">Page 206</p> <p>1 photographs; correct? 2 A. Yes. 3 Q. Tell me again exactly how you made the 4 determination that they were 40 feet away? 5 A. I started at the river edge with my camera, 6 it's a single-lens reflex camera, and attempted to 7 frame the view. And I started with -- I started with 8 the photo with Jeremy in it and tried to reproduce -- 9 or capture everything that can be seen in Melendez 10 number 5 and see that in my viewfinder. 11 Q. Okay. 12 A. And I kept moving side to side and 13 eventually back until I was at a location that 14 reproduced everything in my viewfinder that was shown 15 in this photograph. Once I was in that location I 16 tried to put myself in a location that also captured 17 what could be seen in the photograph of the two girls, 18 which is Melendez Exhibit Number 4, and when I found 19 that then I confirmed that I was able to reproduce 20 what I could see in the Jeremy photo number 5, and was 21 finally able to find a spot on the rock where I could 22 capture what's shown in both photographs, Exhibit 4 23 and Exhibit 5, in my viewfinder. 24 Q. Okay. So are you familiar with the term 25 photogrammetry?</p>	<p style="text-align: right;">Page 208</p> <p>1 40-foot measurement; plus or minus in feet? 2 A. Yeah, maybe plus or minus a foot or two. 3 Q. What method did you use to come up with the 4 40-foot measurement? 5 A. A tape measure. 6 Q. Okay. What kind of camera was -- did Ms. 7 Melendez use? 8 A. She had a cell phone, if I remember 9 correctly. 10 Q. What kind? 11 A. I don't know. 12 Q. What was the focal length? 13 A. I don't know. 14 Q. What was the type of zoom she was using, if 15 at all? 16 A. I don't know. 17 Q. Was she zoomed? 18 A. I don't know. 19 Q. Was it digital? 20 A. I don't know. I assume so. 21 Q. Does it make a difference if it's digital or 22 optical? 23 A. No. 24 Q. What type of -- 25 Did you use a camera to take photos to</p>

<p style="text-align: right;">Page 209</p> <p>1 reflect this 40-foot measurement?</p> <p>2 A. I took photos from the location where I</p> <p>3 think Ms. Melendez was standing.</p> <p>4 Q. What type of camera did you use?</p> <p>5 A. It was a single-lens reflex.</p> <p>6 Q. Brand?</p> <p>7 A. Nikon D3.</p> <p>8 Q. Year?</p> <p>9 A. It's a D3 model.</p> <p>10 Q. Okay. What's the focal length?</p> <p>11 A. Of the photo that I took? Yeah, I just got</p> <p>12 a variable -- variable distance lens, so I don't know.</p> <p>13 Q. And you took measurements while you were</p> <p>14 there?</p> <p>15 A. I did.</p> <p>16 Q. Did you record those measurements?</p> <p>17 A. Yes.</p> <p>18 Q. Are they --</p> <p>19 Is it somewhere in your notes?</p> <p>20 A. Yeah. I need to see my binder.</p> <p>21 [The binder was handed to Dr. Nemire.]</p> <p>22 Q. I mean, if they are, they are; if they</p> <p>23 aren't, they aren't?</p> <p>24 A. Yeah. They would be in my notes.</p> <p>25 Q. How tall are the large rocks that the</p>	<p style="text-align: right;">Page 211</p> <p>1 A. Okay.</p> <p>2 Q. I assume you didn't mean to insult my mother</p> <p>3 by including her in the less than five percent of the</p> <p>4 statistical population.</p> <p>5 A. That's not an insult of any kind. I'm just</p> <p>6 providing a description that if someone is five feet</p> <p>7 or under, they're shorter than five percent of the</p> <p>8 female population.</p> <p>9 Q. The point is, you don't know her height; do</p> <p>10 you?</p> <p>11 A. I think the point is it would be unlikely</p> <p>12 that Ms. Melendez was under five feet tall.</p> <p>13 Q. When she took this photograph of Jeremy --</p> <p>14 A. Yes.</p> <p>15 Q. -- that's in Exhibit 5 of Melendez?</p> <p>16 A. Yes.</p> <p>17 Q. Was Ms. Melendez inadequately supervising</p> <p>18 him, in your opinion, if you have one?</p> <p>19 A. Jeremy is 14, he's got the brain maturation,</p> <p>20 you know, that -- that, you know, he understands risks</p> <p>21 and does not need to be closely monitored in the same</p> <p>22 way that a five year old does.</p> <p>23 Q. How do you know he has the emotional</p> <p>24 maturity?</p> <p>25 A. I'm assuming that he is a typical 14 year</p>
<p style="text-align: right;">Page 210</p> <p>1 children are behind in the photograph?</p> <p>2 A. I don't know.</p> <p>3 Q. Did you measure them?</p> <p>4 A. No. They weren't there.</p> <p>5 Q. They weren't there?</p> <p>6 A. That's what I said.</p> <p>7 Q. They were gone?</p> <p>8 A. Yes.</p> <p>9 Q. How tall is the person --</p> <p>10 How tall is Crissy -- or -- yes, Crissy</p> <p>11 Melendez?</p> <p>12 A. I don't know.</p> <p>13 Q. How tall are you?</p> <p>14 A. Six foot.</p> <p>15 Q. Did you account for any height difference in</p> <p>16 your calculations between you and Ms. Melendez?</p> <p>17 A. I did, but the difference would not be</p> <p>18 critical or important in any way.</p> <p>19 Q. What if she was under five feet tall?</p> <p>20 A. Well, that would put her in the -- in the</p> <p>21 smallest fifth percentile of the female population in</p> <p>22 the United States. But again, this method of</p> <p>23 approximating a viewpoint is -- is a valid one, and</p> <p>24 you don't need photogrammetric software to do it.</p> <p>25 Q. My mother was four foot ten.</p>	<p style="text-align: right;">Page 212</p> <p>1 old child.</p> <p>2 Q. So that's based on an assumption; right?</p> <p>3 A. Based on, you know --</p> <p>4 Q. Okay.</p> <p>5 A. -- you know, all of the research on brain</p> <p>6 maturation and when that occurs is, you know, an</p> <p>7 assumption of typical progression of brain maturation,</p> <p>8 and -- and psychological motor skills, you know, so</p> <p>9 it's all a general. There's certain a range, so --</p> <p>10 Q. So he was -- could handle himself out there,</p> <p>11 he was sufficiently mature and all that sort of thing;</p> <p>12 right?</p> <p>13 A. Well I have no idea, but he's a 14 year old</p> <p>14 child, and my task in this case is not to evaluate his</p> <p>15 capabilities.</p> <p>16 Q. And of course Maggie -- the testimony is he</p> <p>17 was -- she was right next to him.</p> <p>18 A. Well depends on who you talk to.</p> <p>19 Q. Well it depends on the witness testimony;</p> <p>20 doesn't it?</p> <p>21 A. According to Jeremy, she was six to eight</p> <p>22 feet away. According to his mother, he was nowhere</p> <p>23 near Maggie. But again, since the -- we have the Jer</p> <p>24 -- Jeremy's statement to the police, and that's close</p> <p>25 to the time of the event, I put more weight on what</p>

<p style="text-align: right;">Page 213</p> <p>1 Jeremy says.</p> <p>2 Q. Ms. Melendez testified, according to you,</p> <p>3 that Maggie was nowhere near Jeremy; is that correct?</p> <p>4 A. Who?</p> <p>5 Q. Ms. Melendez.</p> <p>6 A. That's my recollection of her testimony,</p> <p>7 yes.</p> <p>8 Q. What did Ms. Jayne say?</p> <p>9 A. She did not know.</p> <p>10 Q. And it's your testimony that Jeremy said</p> <p>11 that Maggie was six feet away from him?</p> <p>12 A. That's what he --</p> <p>13 That's what is written in the police report,</p> <p>14 that she was six to eight feet away.</p> <p>15 Q. Okay. And in your --</p> <p>16 Do you have an opinion whether or not it</p> <p>17 would have been appropriate to let Jeremy be in the</p> <p>18 position he's shown in that photograph with Maggie</p> <p>19 being six feet away if he was monitoring her?</p> <p>20 A. No. As a adult caregiver, I don't think it</p> <p>21 would be responsible to have a 14 year old monitor the</p> <p>22 behavior of a five year old.</p> <p>23 Q. These are two of the other kids --</p> <p>24 A. Yes.</p> <p>25 Q. -- in Exhibit 4.</p>	<p style="text-align: right;">Page 215</p> <p>1 A. I do not have an opinion.</p> <p>2 Q. Okay. This warning, which is I think over</p> <p>3 here.</p> <p>4 Here's the warning sign. I just want to ask</p> <p>5 you some questions about this. It -- This warning</p> <p>6 sign, or caution -- it says "CAUTION"; correct?</p> <p>7 A. Yes.</p> <p>8 Q. It does not say "warning" anywhere on it;</p> <p>9 correct?</p> <p>10 A. That's correct.</p> <p>11 Q. This sign depicted in Exhibit 19 does not</p> <p>12 comply with ANSI Z-35; does it?</p> <p>13 A. Well as indicated in my report, it would be</p> <p>14 -- comply with the earlier versions of ANSI Z535 I</p> <p>15 think before 2002. It does not comply with recent --</p> <p>16 the most recent version of ANSI Z535 which is issued</p> <p>17 in 2011.</p> <p>18 Q. So as of 2013 this sign did not comply with</p> <p>19 the applicable ANSI standard; correct?</p> <p>20 A. That's correct.</p> <p>21 Q. As of 2018 this sign did not comply with the</p> <p>22 applicable ANSI standard; correct?</p> <p>23 A. That's correct.</p> <p>24 Q. ANSI sets the standard by which the adequacy</p> <p>25 of signs is judged; true?</p>
<p style="text-align: right;">Page 214</p> <p>1 A. Yes.</p> <p>2 Q. Inadequate supervision again by mom and mom?</p> <p>3 A. Eleven and 12 year olds have good motor</p> <p>4 skills, they're able to recognize perceived hazards.</p> <p>5 Q. Were there any 11 and 12 year olds or older</p> <p>6 in this group of 28 you looked at in June?</p> <p>7 A. I think I said some might be as old as 11 or</p> <p>8 12.</p> <p>9 Q. So they don't need their parents to be</p> <p>10 monitoring them.</p> <p>11 A. And yet they were.</p> <p>12 Q. Okay. Well they could have just been</p> <p>13 talking to them; couldn't they?</p> <p>14 A. Well the monitor is -- is a behavioral</p> <p>15 measure, it's proximity, and -- and it's taking, you</p> <p>16 know, some actions, you know, that indicate, you know,</p> <p>17 physical control like, you know, holding their hand or</p> <p>18 carrying the child. So those are things that are</p> <p>19 readily observed in the physical world.</p> <p>20 Q. The state of South Dakota allows a daycare</p> <p>21 provider to supervise the outdoor activities of a</p> <p>22 child 3 years or older if the daycare provider's</p> <p>23 inside, as long as they're in line of sight. You</p> <p>24 think that's inadequate supervision; do you have an</p> <p>25 opinion?</p>	<p style="text-align: right;">Page 216</p> <p>1 A. No.</p> <p>2 Q. That's the gold standard for what</p> <p>3 constitutes an appropriate caution or warning sign.</p> <p>4 A. No.</p> <p>5 Q. Have you ever testified before that a sign</p> <p>6 -- a warning sign ought comply with the applicable</p> <p>7 ANSI standard?</p> <p>8 A. Yes.</p> <p>9 Q. Why did you testify to that?</p> <p>10 A. Because the ANSI Z535 standard is an attempt</p> <p>11 to provide consistency in warning signs, and the</p> <p>12 sections of that standard are based on human factors</p> <p>13 research.</p> <p>14 Q. Okay. It's based on --</p> <p>15 A. So the --</p> <p>16 Q. I'm sorry. I thought you were finished.</p> <p>17 A. So it's possible to -- you know, let's see.</p> <p>18 So the ANSI Z535 standards apply really to</p> <p>19 the format of a warning but says very little about the</p> <p>20 content other than, you know, that there should be a</p> <p>21 signal word, a description of the hazard, instruction</p> <p>22 and consequence statements. That's the extent to</p> <p>23 which the ANSI Z535 standard applies. It -- Because</p> <p>24 it does not go into much detail about the content for</p> <p>25 warnings, it would be possible to have a warning that</p>

<p style="text-align: right;">Page 217</p> <p>1 complies with the ANSI Z535 standard but not be an 2 effective warning.</p> <p>3 Q. To be clear, you have testified previously 4 that a warning sign needs to comply with the 5 applicable ANSI standard; correct? In prior cases.</p> <p>6 A. "Needs" to comply. Yes, because of the 7 formatting requirements.</p> <p>8 Q. Okay. And you've written about that as 9 well; correct?</p> <p>10 A. Yes. That's the -- the minimum standard for 11 a warning.</p> <p>12 Q. Correct. This sign, Exhibit 19, doesn't 13 meet the minimum standard for warning; correct?</p> <p>14 A. I didn't say that. It's -- It's not 15 compliant with the recent standards, but it's con -- 16 it's compliant with the pre-2002 standard. And in my 17 report I walk through how the pre-2002 and the 2011 18 standards are different in terms of the color choice, 19 you know, for backgrounds, and in terms of the 20 formatting of the signal word and its background, and 21 in terms of pictorials, and in terms of the inclusion 22 of hazard instruction and consequence statements. So 23 those pieces of the warning are described in the 24 pre-2002 standard and the 2011 standard.</p> <p>25 So one of the ways that this sign is not</p>	<p style="text-align: right;">Page 219</p> <p>1 pre-2002 standard, but just because it doesn't comply 2 with the 2011 standard, it has all the pieces that 3 would make it an effective warning.</p> <p>4 Q. Does this sign comply with the ANSI standard 5 that was in effect as of March 18, 2018 or not?</p> <p>6 A. As I said, it does not.</p> <p>7 Q. The ANSI standard sets the generally 8 accepted protocol for evaluating prospective warning 9 symbols and signs; true?</p> <p>10 A. It provides one methodology for evaluating 11 symbols.</p> <p>12 Q. And it's the methodology that's accepted 13 within the field of human-factors engineering; 14 correct?</p> <p>15 A. Sure.</p> <p>16 Q. It --</p> <p>17 The ANSI standard incorporates generally 18 accepted human-factors engineering techniques and 19 beliefs; correct?</p> <p>20 A. I'm sorry. Ask that again.</p> <p>21 Q. The ANSI standard incorporates generally 22 accepted human-factors engineering techniques; 23 correct?</p> <p>24 A. "Techniques."</p> <p>25 Q. Beliefs? Principles?</p>
<p style="text-align: right;">Page 218</p> <p>1 consistent with the 2011 standard is the formatting of 2 the signal word. So I think it's Exhibit R of my 3 report shows the older standard and the newer 4 standard. So there's not a whole lot of difference, 5 so I could not say that the two -- pre-2002 standard, 6 the format would be any more or any less effective 7 than the 2011 standard. You know, both standards ask 8 for a signal word, you know, the difference is the -- 9 you know, the -- I guess the extra clutter in the 10 background for the signal word in the pre-2002 11 standard, and the difference is als -- and so that 12 extra clutter most likely would not have much, if any, 13 effect on how people would notice, read, understand or 14 follow a warning. The second difference is the 15 addition of the exclamation mark and the warning 16 triangle in the 2011 standard. That symbol can be 17 important in providing -- you know, encouraging 18 somebody to notice it, but research has shown that 19 people don't pay that much attention to the 20 exclamation mark and the triangle. So -- So in 21 effect, the differences in format between, you know, 22 the pre-2002 ANSI Z535 standard and the 2011 standard 23 is quite minimum -- minimal, and so this warning that 24 was shown and displayed in Falls Park is close -- 25 [coughing] -- excuse me, closer to the two thousand --</p>	<p style="text-align: right;">Page 220</p> <p>1 A. As I said, the ANSI Z535 standards are based 2 on human-factors research on what makes an effective 3 warning, so -- so -- so the ANSI standards have 4 incorporated some of those things, such as use of a 5 signal word, use of pictorials, when to use block 6 capital letters and when to use mixed case, font size, 7 a number of things, you know, all based on 8 human-factors research.</p> <p>9 Q. All right. Let me rephrase that.</p> <p>10 The ANSI standard, ANSI Z-35, incorporates 11 generally accepted human-factors engineering 12 principles; correct?</p> <p>13 A. You know, again, "principles." You know -- 14 You know, I'm sure Ms. Gill wrote these questions for 15 you, but they just don't make sense. So it -- As I've 16 said, the ANSI Z535 standards are based on 17 human-factors research, it's data that has come from 18 doing -- conducting empirical research with what is 19 noticeable, what makes a display noticeable, what 20 makes text readable, understandable, based on research 21 that shows which of these components provided in one 22 piece are most likely to result in people following 23 these warnings. So a human-factors principle might be 24 true in that a human-factors principle might be 25 something like, you know, provide a list of items in a</p>

<p style="text-align: right;">Page 221</p> <p>1 bullet format as opposed to one block text. ANSI Z535</p> <p>2 certainly recommends that.</p> <p>3 Q. Is it your --</p> <p>4 Are you done?</p> <p>5 A. So --</p> <p>6 But so yes, there might be some</p> <p>7 human-factors principles that are incorporated in the</p> <p>8 ANSI Z535 standards, but as a blanket statement, you</p> <p>9 know, it somehow incorporates all human-factors</p> <p>10 principles is just not accurate or correct in any way.</p> <p>11 Q. How far was the closest warning sign or</p> <p>12 caution sign to the area where Maggie went in the</p> <p>13 water; how many feet?</p> <p>14 A. (Witness reviewing documents.) Well the</p> <p>15 closest sign was maybe -- maybe a hundred feet, --</p> <p>16 Q. Did you meas --</p> <p>17 A. -- maybe a little bit more.</p> <p>18 Q. Did you measure it?</p> <p>19 A. In the past I've measured the width of the</p> <p>20 -- Oh, actually, no, maybe more like 50 or 60 feet. I</p> <p>21 measured the -- using a Google aerial photo, measured</p> <p>22 the distance from the area where Maggie fell to the</p> <p>23 sidewalk, and that was about a hundred feet.</p> <p>24 Q. Okay.</p> <p>25 A. So the closest sign to where Maggie fell was</p>	<p style="text-align: right;">Page 223</p> <p>1 means in this situation.</p> <p>2 Q. Isn't it true that the river -- the</p> <p>3 characteristics of the area around the river differ</p> <p>4 markedly a mile, two miles, three miles down river</p> <p>5 than it does in this urban park setting?</p> <p>6 A. I have not been to any other parts of the</p> <p>7 river.</p> <p>8 Q. Okay. So again, warnings are most effective</p> <p>9 when they're placed at the time and location where a</p> <p>10 person needs it; right?</p> <p>11 A. If you need a warning, then yes, --</p> <p>12 Q. Okay.</p> <p>13 A. -- that is true. You need to place it --</p> <p>14 Q. Right.</p> <p>15 A. -- at time and location.</p> <p>16 Q. I just need to know if you are of the</p> <p>17 opinion that having the closest warning sign to the</p> <p>18 area where Maggie fell in being 60-some feet away was</p> <p>19 or was not sufficiently close in terms of location to</p> <p>20 make it effective.</p> <p>21 A. In this situation 60 feet could be close</p> <p>22 enough. Now the problem with this particular warning</p> <p>23 sign is it's oriented in such a way that if you're</p> <p>24 standing where Maggie fell you would not be able to</p> <p>25 see this sign, you know, so, you know, we're talking</p>
<p style="text-align: right;">Page 222</p> <p>1 at the intersection of the sidewalk and the pedestrian</p> <p>2 bridge, so that might be, you know, maybe 60 or 70</p> <p>3 feet.</p> <p>4 Q. Have you measured it?</p> <p>5 A. Eyeballing it from --</p> <p>6 Q. From an aerial photograph?</p> <p>7 A. Yes.</p> <p>8 Q. Okay.</p> <p>9 A. Based on my previous measurement of 100 feet</p> <p>10 from the river's edge to the sidewalk.</p> <p>11 Q. Do you agree with the proposition that</p> <p>12 warnings are most effective when they're placed at the</p> <p>13 time and location where a person needs it?</p> <p>14 A. I do.</p> <p>15 Q. And is it your opinion that your estimate of</p> <p>16 60 feet from the closest sign to the point where</p> <p>17 Maggie fell in was a -- was sufficiently close to the</p> <p>18 location where she fell in to constitute an effective</p> <p>19 warning?</p> <p>20 A. Well, you know, "close" in this case would</p> <p>21 be placing warning signs along this particular edge of</p> <p>22 the river maybe every 50 feet. Maybe having three</p> <p>23 signs along the edge of the river in this location,</p> <p>24 which means that you want to do the same thing along</p> <p>25 the entire river on both sides. That's what "close"</p>	<p style="text-align: right;">Page 224</p> <p>1 about not just distance, but we're also talking about</p> <p>2 orientation in terms of what would make a warning more</p> <p>3 effective. So in this situation if you wanted a -- if</p> <p>4 you -- if you thought there was a need for a warning</p> <p>5 sign then you want to place it in places where people</p> <p>6 would see it before they go wandering off the</p> <p>7 sidewalks and to the edge of the river.</p> <p>8 Q. So if I understand you correctly, if we</p> <p>9 assume for a moment that a warning was needed, the</p> <p>10 warning sign needed to be more proximate to the area</p> <p>11 of the fall than it was to -- than where it was</p> <p>12 located on the day of the incident. Is that a fair</p> <p>13 statement, sir?</p> <p>14 A. Well --</p> <p>15 And I'm saying no, not necessarily.</p> <p>16 Q. Oh.</p> <p>17 A. Because proximate to the --</p> <p>18 Well, one, you say proximate to the area of</p> <p>19 the fall presumes that you can anticipate where people</p> <p>20 will fall off the edge of the -- of the canyon wall,</p> <p>21 and -- which means then that anywhere that there is a</p> <p>22 cliff where someone could fall off of you need a</p> <p>23 warning every few feet to make sure that people</p> <p>24 approaching this area would see it here, because if</p> <p>25 they're over there they might not see it over there</p>

<p style="text-align: right;">Page 225</p> <p>1 ten feet over, twenty feet over, so then you need 2 warning signs along the river, everywhere along the 3 river, which is, I think, an untenable position. So 4 better positioned would be to provide warning signs in 5 areas before [coughing] -- before people are about to 6 go off the sidewalk and -- and wander across the grass 7 or -- or along -- towards the river's edge. And that 8 might be several different locations, but not 9 necessarily, you know, near the actual hazard. There 10 where you would need a warning is when they make the 11 decision to leave the sidewalk and go to the river, 12 then you would want a warning at that place, which 13 could be far away, it might be a hundred feet. So -- 14 And it might be closer, it depends on where that 15 sidewalk is. But it's that decision point that people 16 need to be warned about the hazard of the cliff if in 17 fact there's a need to warn about the hazard of the 18 cliff.</p> <p>19 Q. You are highly trained in human factors; 20 true?</p> <p>21 A. Yes.</p> <p>22 Q. You're familiar with basic precepts, 23 research and principles of human factors?</p> <p>24 A. Yes.</p> <p>25 Q. Does this sign comply with basic research</p>	<p style="text-align: right;">Page 227</p> <p>1 statement that "no swimming, you could drown," 2 "turbulent water, you could drown." That explicit 3 statement is not needed because it's understood in the 4 pictorial.</p> <p>5 Q. Okay.</p> <p>6 A. The same with the slippery rocks. "Slippery 7 rocks, you might fall," that's not needed to say "stay 8 off the rocks" or "keep off the rocks."</p> <p>9 Q. Isn't it a basic principle of human factors 10 that a warning needs to describe the specific nature 11 of the hazard, the consequences, and how to comply in 12 order for it to be even remotely considered effective?</p> <p>13 A. No, I would not agree with that just based 14 on the research I just told you about.</p> <p>15 Q. Would you agree that to increase the 16 probability of compliance with a warning, a warning 17 should explicitly describe the consequences of failing 18 to heed the warning?</p> <p>19 A. Again, the instruction and consequence 20 statements are not needed if they are -- if they are 21 redundant with other information that's in the 22 warning.</p> <p>23 Q. Do you agree with the statement that people 24 are less likely to understand or comply with a hazard 25 if they do not know what it is?</p>
<p style="text-align: right;">Page 226</p> <p>1 and principles of human factors as to what constitutes 2 an effective warning with respect to the items that it 3 warns of?</p> <p>4 A. Yes, as I said in my report.</p> <p>5 Q. It does.</p> <p>6 A. Yes.</p> <p>7 Q. Notwithstanding the fact that it does not 8 comply with ANSI; correct?</p> <p>9 A. Well, as I said, it complies with an older 10 version of ANSI Z535, and the differences between the 11 pre-2002 and the 2011 are insignificant formatting 12 issues and not something that would significantly 13 affect the effectiveness of the sign.</p> <p>14 Q. And notwithstanding the fact that it does 15 not contain explicit warnings and instructions on how 16 to avoid the warnings, or avoid the hazard?</p> <p>17 A. Well as I said in my report, there's 18 research that indicates that redundant information can 19 be omitted from a warning without decreasing -- 20 without substantially decreasing the effectiveness of 21 the warning. So in this case, you know, an explicit 22 warning might be "stay off the rocks," no -- and I 23 guess "no swimming in turbulent water." They both 24 imply that there's a drowning hazard based -- just 25 based on the pictorials. You don't need an explicit</p>	<p style="text-align: right;">Page 228</p> <p>1 A. Yeah, that's certainly true.</p> <p>2 Q. Do you agree with the statement that to 3 increase the probability of compliance with a warning, 4 warnings should provide brief and explicit 5 instructions on how to comply?</p> <p>6 A. If the information is not already provided, 7 then a brief and explicit instruction statement is 8 necessary.</p> <p>9 THE WITNESS: And I'm going to get some 10 water. 11 (Discussion off the stenographic 12 record.)</p> <p>13 BY MR. SIEFF:</p> <p>14 Q. Do you agree that in an area where drowning 15 is a hazard, that the action warning of "caution" is 16 appropriate?</p> <p>17 A. I'm sorry. Ask that again.</p> <p>18 Q. Sure.</p> <p>19 In an area where the hazard of drowning is 20 present, do you agree that the action word of 21 "caution" is appropriate, or should it be something 22 stronger?</p> <p>23 A. Yes, it should be something stronger. 24 "Danger" would be a better signal word here than 25 "caution."</p>

<p style="text-align: right;">Page 229</p> <p>1 Q. All right. So you do agree that at least as 2 far as the signal word, you are critical of the use of 3 the term "caution." 4 A. Yes. "Danger" would be a much better word. 5 Q. And you are critical of the coloring on this 6 sign; are you not? 7 A. Well if -- if -- if the signal word were 8 "danger" and we wanted to be -- to comply with Z535, 9 then the background for the signal word would be red, 10 and red is -- more readily denotes or connotes hazard 11 than yellow. 12 Q. You still do research and writing and things 13 like that and some work outside of the litigation 14 field. Have you ever, in your career, recommended to 15 a client use of a non-ANSI-compliant warning or 16 caution sign? 17 A. No. 18 Q. Would you ever recommend to a client use of 19 a non-ANSI-compliant sign? 20 A. No. 21 Q. Have you done any testing to determine 22 whether or not the warning sign at issue that's in 23 front of you has achieved compliance or noncompliance? 24 If you understand my question? 25 A. Yes, and I've not done any study to evaluate</p>	<p style="text-align: right;">Page 231</p> <p>1 A. Yes. 2 Q. The first tier of the safety hierarchy is to 3 design out a hazard; correct? 4 A. Yes. 5 Q. The next one's to guard against a hazard; 6 correct? 7 A. Yes. 8 Q. And the third and the least effective is to 9 warn against a hazard; correct? 10 A. Yes. 11 Q. In this instance I think it would -- you 12 would agree with me that it'd be very difficult to 13 design out the hazard of the rushing water, the rocks 14 and the foam. 15 A. Yes. 16 Q. Let's talk about guarding against it. Are 17 you aware of anything that would have prevented the 18 city from using temporary fencing in the area where 19 Maggie fell during high foam season? 20 A. No. 21 Q. Are you aware of anything that would have 22 prevented the city from utilizing something along the 23 lines of LED lighting like you might see on a road 24 warning of road construction, in the area where Maggie 25 fell during high flood season?</p>
<p style="text-align: right;">Page 230</p> <p>1 that, but as I describe in my report, it has the 2 effectiveness -- it has the components of an effective 3 warning, and most likely would be noticed, read, 4 understood and followed. 5 Q. And you -- 6 So you believe that it's an effective 7 warning sign? 8 A. Yes. 9 Q. Achieving compliance? 10 A. Well you rarely get a hundred percent 11 compliance, so it's, you know -- 12 MR. SIEFF: Can you mark that for me? 13 A. -- the research literature would -- you 14 know, shows, you know, sometimes you get a hundred 15 percent compliance with a good sign, and sometimes 16 maybe more like 60 percent. So as the -- you know, 17 there are a number of factors that go into whether 18 someone will follow a sign or not. Formatting is just 19 one of those factors in the Z535 standard, and this 20 standard just addresses formatting issues, but this 21 component -- I'm sorry. This warning sign has 22 components of an effective sign that could achieve, 23 you know, significant amounts of compliance. 24 Q. Okay. You're familiar with the safety 25 hierarchy.</p>	<p style="text-align: right;">Page 232</p> <p>1 A. Am I aware of anything that might prevent 2 them from doing that? 3 Q. Yeah. 4 A. No. They can do whatever they want, so. 5 Q. I'm just asking you if you are aware of 6 anything that prevented them. 7 A. Well -- and placing warnings, and fencing, 8 barricades and, you know, a variable messages sign 9 which is a warning, you have to take into a number of 10 factors. And yes, you could put variable messaging 11 signs up all over the park if you wanted to. I don't 12 think it would be a very pleasant place to visit. So 13 if I were designing this, I would not recommend 14 putting up variable messaging signs in this park. 15 Q. Knowing that we've had a number of drownings 16 at least alleged to have been caused due to the 17 presence of high foam during the foam runoff, the 18 spring runoff, do you think it would be prudent to do 19 -- to take any other action of any type or kind 20 relative to the accumulation of foam at Falls Park? 21 Whether it be additional warnings, or barricades, or 22 guarding, or an Observation Tower or deck or anything 23 of the sort? 24 A. As I've said multiple times, I don't 25 consider the foam to be a hazard that's independent of</p>

<p style="text-align: right;">Page 233</p> <p>1 the natural hazards along and in the river. 2 Consequently, I don't believe that warnings are 3 necessary because this is a readily apparent set of 4 hazards, and -- and warnings aren't required in that 5 situation. It's not clear to me that -- well yeah. 6 So it's not clear to me that that foam poses a hazard 7 independently of those natural hazards, and -- but, 8 because there's now two incidents which rightly or 9 wrongly have been attributed to foam, you know, then 10 from the city's standpoint as a -- you know, at the 11 very least as a public-relations measure, then 12 something should be done to deal with the foam. So if 13 I were to ask -- asked to be -- 14 If I were asked to design some other safety 15 feature having to do with warning or barricading about 16 the foam, then yes, maybe temporary fencing is a good 17 idea; yes, maybe explicitly warning about this foam 18 that can look like snow, but not because I see that 19 it's a real hazard, but more because it's a public 20 perception issue. 21 Q. You did testify earlier that the foam was an 22 open and obvious hazard. 23 A. Yes. 24 Q. Isn't it true that from time to time it's 25 prudent to provide an additional warning of an open</p>	<p style="text-align: right;">Page 235</p> <p>1 pile of gravel here, too. I would surround this whole 2 thing with orange cones, but I would use 42-inch 3 delineators instead. And since there's probably 4 nighttime driving in this area, I would make sure that 5 the delineators had reflective bands at the top. So I 6 don't know if that answers your question. 7 Q. It does. 8 A. I think they did an inadequate job. 9 Q. Okay. 10 A. The reason for warning about this pile of 11 dirt is -- is this is a structured environment, it's 12 an urban environment, there's expectations of clear 13 roadways, and now you have violated those expectations 14 by leaving a big lump of dirt in the way. And so 15 since it takes longer for people to notice things that 16 are unexpected, then you really need to call this out 17 in some way so that people don't run into it or tip 18 their vehicle because they ran into it, and so, yes, 19 this pile of dirt and gravel needs to be warned about 20 because it's an urban environment, it appears to be a 21 public street, there is the expectation that there 22 will be no obstacles in the roadway, and you need to 23 put better warnings around this thing. 24 Q. Okay. You testified a little bit ago that 25 you believe that the warning -- the sign which is in</p>
<p style="text-align: right;">Page 234</p> <p>1 and obvious hazard such as an orange cone or something 2 like that? 3 A. I'm -- I guess I'm having trouble following 4 your question. 5 Q. Can things like orange cones help alert 6 individuals to the presence of a hazard? 7 A. Yes. They can, yes. 8 Q. Even a hazard that might be otherwise 9 readily apparent to them? 10 A. I don't know that that would be true. 11 Q. Okay. 12 (Discussion off the stenographic record.) 13 (Nemire Exhibit 3 marked for 14 identification.) 15 BY MR. SIEFF: 16 Q. Showing you a photograph, sir, Exhibit 3, 17 that I myself took on Kenwood Parkway in Minneapolis, 18 Minnesota about one week ago. Can you -- It shows a 19 large pile of dirt in the road where there's obviously 20 some construction going on, and an orange cone. 21 Can you -- Do you have any thoughts or an 22 opinion on why they might put an orange cone in front 23 of that dirt? 24 A. Well if I were to do it I would recommend 25 that they surround -- it looks like maybe there's a</p>	<p style="text-align: right;">Page 236</p> <p>1 front of you, I don't remember the exhibit number. 2 Can you tell me what it is, please? 3 A. 19. Fischer 19. 4 Q. Fischer 19, is effective. 5 (Discussion off the stenographic record.) 6 (Nemire Exhibit 4 marked for 7 identification.) 8 BY MR. SIEFF: 9 Q. I'm going to show you an email authored by 10 Mr. Michael Hall, of the City of Sioux Falls, on 11 August 26, 2018, after Maggie's death, sent to Doug 12 Kirkus, Don Kearney and Karen Leonard, who I'll 13 represent my belief that they're all with the City of 14 Sioux Falls. He states, quote, a friend sent me a 15 series of photos from Falls Park yesterday...I'm just 16 sending one to illustrate what we have all recognized 17 for a long time...risky behavior occurs on a daily 18 basis at Falls Park. He said the warnings signs were 19 clearly visible by those choosing to ignore them. 20 But I want to ask you a question. Given the 21 fact that these people in this photograph apparently 22 had warning signs visible to them, based on your 23 looking at that photograph would you continue to hold 24 the opinion that those warning signs are effective in 25 obtaining compliance?</p>

<p style="text-align: right;">Page 237</p> <p>1 A. Well as I said earlier, there's a lot of 2 different reasons why someone may not follow a warning 3 sign. Typically the -- you have a warning sign, and 4 if you measure the noticeability of the sign in terms 5 of whether somebody would notice it, I'll just give 6 some examples. You might have 90 percent of people 7 saying that they would notice the sign or 8 demonstrating that they noticed the sign; you might 9 have 80 percent of people who -- who actually read the 10 sign; then you might have 70 percent of the people who 11 actually understand what the sign says; and then you 12 might have 60 percent of the people who actually 13 follow the sign. So there's -- research has shown 14 that in general there's far fewer people follow the 15 sign that notice it. Then there's other reasons for 16 people not following the sign, such as the cost of 17 compliance, which means that if I want to have a good 18 time on the river and -- you know, I'm -- I'm going to 19 do that regardless of what the warning says, it costs 20 me too much, in this case it costs me too much fun. 21 you know, to comply with the warning sign so I'm not 22 going to follow this warning. 23 So it does not surprise me that people, they 24 might see the sign and still go into the river. It 25 happens. It would happen if you had fencing. You</p>	<p style="text-align: right;">Page 239</p> <p>1 Q. All right. 2 MR. SIEFF: That's all the questions I 3 have. 4 A. It shows that some people will not comply 5 with the signs. 6 MR. SIEFF: That's all the questions I 7 have. Thank you. 8 MR. MOORE: We'll read and sign. 9 THE REPORTER: Thank you. 10 Off the record. 11 (Deposition concluded at 3:19 p.m.) 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
<p style="text-align: right;">Page 238</p> <p>1 still have -- you know, if you put up the 42-inch 2 fencing that Mr. McCord recommends you will still have 3 probably most of these same people hopping the fence 4 so they can go play in the river. 5 Q. That's pure speculation; isn't it, sir? 6 A. No, it isn't. 7 Q. Have you ever designed a park? 8 A. I have not. 9 Q. You ever read the rules or the guidelines of 10 the National Park Service with respect -- 11 A. I don't believe so. 12 Q. -- to guarding or barricades? 13 A. I don't believe so. 14 Q. Do you think they have more knowledge and 15 experience on what's appropriate in a park in terms of 16 guarding and barricades than you do? 17 A. Most likely. 18 Q. The same would be true for the USDA Forest 19 Service; wouldn't it? 20 A. Most likely. 21 Q. Okay. The photograph aptly illustrates the 22 ineffectiveness of the warning signs that are in place 23 currently at Falls Park in Sioux Falls, South Dakota; 24 true? 25 A. I disagree.</p>	<p style="text-align: right;">Page 240</p> <p>1 CERTIFICATE 2 I, Debby J. Campeau, hereby certify that I 3 am qualified as a verbatim shorthand reporter; that I 4 took in stenographic shorthand the testimony of 5 KENNETH NEMIRE, Ph.D., CPE, at the time and place 6 aforesaid; and that the foregoing transcript 7 consisting of 239 pages is a true and correct, full 8 and complete transcription of said shorthand notes, 9 to the best of my ability. 10 Dated at Lino Lakes, Minnesota, this 26th 11 day of August, 2019. 12 13 14 15 DEBBY J. CAMPEAU 16 Notary Public 17 18 19 20 21 22 23 24 25</p>

Page 241

1 SIGNATURE PAGE

2 I, KENNETH NEMIRE, Ph.D., CPE., the deponent,
 3 hereby certify that I have read the foregoing
 4 transcript, consisting of 239 pages, and that said
 5 transcript is a true and correct, full and complete
 6 transcription of my deposition, except per the
 7 attached corrections, if any.

8 PAGE LINE CHANGE/REASON FOR CHANGE

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20 Date Signature of Witness

21
 22 WITNESS MY HAND AND SEAL this _____
 23 day of _____, 2019.
 24

25 (DJC) _____

A	93:21 221:10	230:20	afraid 120:21,22	America 48:13
abilities 10:13	accusation	addressing	age 118:7,8,8,13	American 47:24
ability 240:9	190:18,24	36:22	118:15	amount 6:17
able 11:22 15:12	192:12	adequacy	ages 84:21 196:1	20:19 103:3
15:12,14 19:2	accuse 189:2	100:12 101:16	196:2	amounts 230:23
19:6 154:13	accused 197:19	215:24	ago 59:10,12	analogy 126:22
197:10 206:19	achieve 230:22	adequate 41:22	69:14 89:21	analyses 2:18
206:21 214:4	achieved 229:23	50:10 56:8	234:18 235:24	43:23 98:3,14
223:24	Achieving 230:9	101:7,22 193:9	agree 14:21,24	99:15 100:8
absence 98:12	acknowledge	193:18 201:17	15:5,6 16:22	101:4,6,21
111:22 145:18	119:1,3 123:12	adequately 55:5	17:15,19 21:13	103:6 116:9
145:23,25	166:18,21,25	55:10,16 56:8	30:5 37:15	119:22 122:4
171:19	act 201:9,10	73:21 188:9,12	38:6 40:12,14	122:18,22,23
absent 143:8	acted 124:19	188:15,21	46:13 53:20,24	123:6,11,24
absolutely	acting 154:25	189:3,10	58:24 59:3	124:20,22
147:14	action 228:15,20	adjust 205:15	73:24 74:22	125:5 128:14
academia 37:20	232:19	admissible 53:2	102:9 111:7,8	128:23 130:4
accepted 38:25	actions 97:18	admitted 52:20	115:16 120:1	131:6,23 132:7
43:5 50:6,18	214:16	adult 10:4,14	129:18 179:19	132:23 133:9
50:19 51:2,3	activities 71:10	164:20 198:20	195:21 222:11	133:16,21
71:20 92:19	97:13 214:21	199:11,13,19	227:13,15,23	134:19,23,25
219:8,12,18,22	activity 100:11	199:20,24	228:2,14,20	137:4 197:15
220:11	acts 109:23	200:3,17,21,21	229:1 231:12	207:9
access 149:10	177:17	200:23,25	agreed 38:13	analysis 42:4
accident 128:11	actual 43:19	201:1 213:20	97:1	64:16,16 97:22
accidents 122:5	58:1 119:24	adults 87:19	agreement	97:23 98:1,7
122:5	171:16 225:9	105:17,19	26:14,18 52:22	98:15,25 99:4
accompanied	actuality 184:23	139:2 191:14	ahead 64:22	100:2,5,11,13
68:2 139:18	add 59:15 84:21	193:5,25 194:8	air 34:22 35:12	100:19,23
accompany	added 59:24,25	194:17 195:3	36:10 86:10	101:17 115:17
146:6	60:5,7,22	196:12,23,24	87:5 88:9 89:4	115:24 116:5
accompanying	75:17	197:9	akin 82:6	122:13,15
191:14 196:12	addition 218:15	advantageous	Alameda 51:23	123:4 124:5
account 88:4	additional 12:12	29:13	alert 234:5	126:5 128:1,10
210:15	29:16 56:11,19	adverse 29:5	allegation	129:5,8 133:14
accounts 121:15	56:24 57:9	advise 15:1,7,18	128:18	133:17 134:5,5
accumulates	60:13 61:16,22	16:9	alleged 52:8	134:6 135:10
175:13	62:25 63:4,7	advised 25:16	129:9 232:16	135:14,19
accumulation	64:23 65:7,11	25:19	allowed 50:4,4,6	136:14
232:20	65:14 232:21	advocate 7:23	52:14	analyze 130:23
accumulations	233:25	14:20,22,23	allows 214:20	175:7
145:3	address 20:22	114:3,8,9	als 218:11	analyzed 117:19
accuracy 38:21	36:21 62:11	advocating	altered 45:18	168:17
111:19,22	97:2 131:13,20	115:1	83:21	and/or 15:1 16:9
accurate 15:14	132:10,22	aerial 221:21	altogether 138:6	92:5 117:22
30:13 39:3	136:17	222:6	amend 35:24	anecdotal
41:16 42:7	addressed	affect 226:13	amended 36:4	177:10 178:21
43:19,21 46:4	137:10 171:16	affiliated 26:7	83:2,6,21	annual 126:12
47:4 68:24	addresses	aforesaid 240:6	amending 36:5	177:13

ANSI 215:12,14 215:16,19,22 215:24 216:7 216:10,18,23 217:1,5 218:22 219:4,7,17,21 220:1,3,10,10 220:16 221:1,8 226:8,10 answer 7:9 20:10 35:4 57:5 64:22 110:24 112:9 113:17,24 114:2 115:5 125:14,15,19 131:8 142:9 177:21 180:23 192:14 answered 150:7 answers 114:2 235:6 anticipate 224:19 anybody 34:5 143:13,14 147:3 149:5,8 149:10 160:14 anybody's 143:5 apologize 42:22 147:13 apparent 66:13 75:17 167:7 233:3 234:9 apparently 140:3,25 236:21 appear 18:25,25 58:16 117:2 118:18 120:6 120:10 121:1,4 121:20,23 123:1 162:24 APPEARAN... 2:1 appeared 109:18 117:21 118:20 123:7 123:25 124:8	129:19 143:6 150:10 192:20 193:25 194:14 appears 124:23 137:8 155:17 155:21 194:5 235:20 applicable 215:19,22 216:6 217:5 application 40:3 40:9 44:23 applied 157:22 applies 216:23 apply 216:18 applying 40:17 44:21 appreciate 12:15 160:16 appreciating 160:13 approach 164:19 175:8 approaching 224:24 appropriate 53:8 97:21 98:1 168:24 213:17 216:3 228:16,21 238:15 approximately 1:23 4:21 5:12 104:23 107:11 124:13 approximating 210:23 April 24:23 aptly 238:21 architecture 9:21,23 area 5:20 12:10 31:10 54:7 55:6 58:13 78:23 79:2,14 79:22 80:7,12 84:17 104:23 107:12,17 124:13 125:6	137:14 146:14 150:3,19 152:3 152:4,7,8,15 152:18 153:16 155:11 158:10 159:13 163:15 163:17,25 164:5,8,22 165:1,6,25 170:17 176:2 182:1,3,4,5,6,8 182:9,11,15 221:12,22 223:3,18 224:10,18,24 228:14,19 231:18,24 235:4 areas 10:9 33:13 144:19 163:24 164:6 165:12 176:2 225:5 Argus 115:19 122:9,10,13,25 129:6 130:25 Arizona 81:3 arm's 199:11 arriving 18:8 art 72:4,6,7,10 72:11,13,16 74:18,20,20,22 74:25 75:3,5 article 6:18,24 11:25 14:6,19 16:14 63:17 65:1 117:25 118:10 119:8 119:11 120:14 120:24 126:18 articles 6:15 7:22 8:1 11:24 67:4 asked 7:8 22:13 22:15,15 25:7 28:17,20,22,25 49:24 60:19 62:5 90:5 100:15 108:16 109:1,4 110:22	112:7 132:7,9 134:22 135:2 135:10 144:20 157:19 177:2 180:13 181:9,9 185:7,11 187:13 233:13 233:14 asking 12:7 26:13 34:6 59:4 74:19 75:2 112:21,24 112:25 114:1,3 114:6,12 145:13 147:6 166:13 184:10 232:5 aspect 57:19 assertions 50:22 assess 125:1 assessments 96:25 assigned 21:15 assistant 139:11 139:14 assume 13:8 16:15 135:9 168:10 190:22 191:4 208:20 211:2 224:9 assuming 73:10 164:4 168:14 211:25 assumption 212:2,7 assumptions 54:1 attached 2:21 241:7 attempt 79:6 82:5,10 85:24 104:6 116:18 130:23 216:10 attempted 104:15 206:6 attempting 76:9 attempts 104:1 104:10 149:13 attention 14:17	41:18,21 91:8 111:24 115:13 115:15 163:21 171:13 218:19 attentive 161:24 162:15 203:25 attorney 4:7 22:15 52:13 attorneys 6:9 76:25 attract 180:9 attractant 109:23 177:18 177:22 178:1,7 178:23 179:4,6 179:6,10,21 180:5,6,12 181:6 attraction 109:12,25 attracts 175:14 176:22 177:14 180:17 181:1 181:11 attributed 233:9 audience 76:24 77:13,16 82:5 audiences 77:1 77:15 audit 101:11,14 101:15 auditory 73:1 153:25 Aug 2:21 August 1:16,23 127:25 156:22 236:11 240:11 author 63:15,17 65:1 authored 35:14 83:3 236:9 authoring 83:9 authors 63:25 autopsy 89:11 89:14,15,17 90:3,10 available 58:2 85:23 109:7 123:5 125:18
--	--	---	---	---

163:5 190:23 191:1 Avenue 1:21 2:4 2:9 avoid 76:3 100:6 226:16,16 aware 22:14 51:21 52:4 58:13 63:3 64:2 66:19 96:1 98:22 125:21 128:18 129:1,14 140:6 167:23 172:6 172:11 173:7 231:17,21 232:1,5 awfully 189:15 a.m 1:23 53:17 115:10	158:14 181:15 balance 164:11 bands 235:5 bank 175:15 176:23 177:14 Barbara 11:25 barricades 232:8,21 238:12,16 barricading 233:15 barriers 182:18 base 41:14 42:11 85:20 162:2,4 162:19 191:8 based 10:19,20 11:9,17 19:22 20:1 29:24 34:9 38:22,23 39:3 40:20 43:19 44:21 54:10 56:8 65:2 82:16,17 82:22 85:19 89:3 92:18 94:18,20 100:9 104:5 105:3 122:23 123:23 129:6 131:23 151:5 156:6 161:23 163:4 186:4 187:10 191:5 201:22 212:2,3 216:12 216:14 220:1,7 220:16,20 222:9 226:24 226:25 227:13 236:22 bases 59:16 92:10 94:14 95:11 96:6 114:20,21 133:8,17 134:1 134:2 189:25 192:8 basic 172:15 225:22,25 227:9	Basically 188:18 basis 11:6,19 12:8 50:10 56:7 126:12 133:6 143:5,19 145:10 177:14 179:16 198:8 201:16 202:4 236:18 began 48:20 69:3 181:5 behalf 2:2,6 4:3 32:11 behave 95:3,5 behavior 33:7 42:16 164:21 195:7 197:9 213:22 236:17 behavioral 214:14 belabor 179:5 belief 85:21 143:19 172:3,8 236:13 beliefs 219:19 219:25 believe 12:14 15:17,24 21:22 21:25 22:24 23:17,25 31:1 36:9,12 41:21 87:2,14 88:11 89:20 99:20 102:17 103:8 114:23 118:2,4 119:13 132:19 139:13 141:14 145:10 151:9 151:22 157:3,6 158:11 177:11 177:11 179:20 180:24,25 181:1 183:16 184:16,19 185:18 230:6 233:2 235:25 238:11,13 believed 108:8 believes 42:23	109:25 113:7 believing 34:23 bell 52:7 Ben 103:7 benefit 83:17 108:6 130:11 best 123:22 240:9 better 164:13 225:4 228:24 229:4 235:23 beyond 16:6 129:15 134:19 152:7 190:20 bias 54:5 57:21 57:22,23 58:10 58:15,21 59:2 59:5,15 60:15 60:21 61:8,17 61:19,20 64:4 64:10 157:8 big 45:11 138:9 143:9,10,13 176:9,15,17 205:6 235:14 bill 26:21 billed 27:9 billing 27:2 binder 56:25 57:22 58:25 59:25 60:9,22 61:23 63:7,11 64:24 65:8,15 66:4,14,23 67:1,10,11 68:24 69:3 200:6 209:20 209:21 bit 157:8 163:14 221:17 235:24 blanket 20:23 21:4 23:23 109:22 221:8 blip 181:7 block 220:5 221:1 Blomgren 51:9 51:20 blueprints 151:2	151:6,15 Board 91:18 body 45:3 86:17 89:19 162:18 book 12:1,2 15:16 45:6 bothered 193:14 194:21 bottom 54:15 82:2 159:3 173:13 bound 74:2 Box 2:8 boy 106:25 brain 10:12 31:22 46:21,23 211:19 212:5,7 Brand 209:6 breached 51:13 51:19 break 53:14,15 115:7 188:3 breath 137:17 bridge 222:2 brief 228:4,7 bring 4:12 27:4 bringing 117:22 119:4,5 broad 33:20 34:1 36:1 57:9 71:14 brought 119:17 bruises 87:23,24 87:25 88:3 89:7,9 90:15 buff 203:13 builds 113:19 126:20 buildup 106:17 106:22 125:22 126:6 127:20 129:2 132:20 146:14,16 148:17 176:2 built 141:16 170:9 bulk 125:12 179:8 bullet 221:1
---	--	--	--	---

business 5:16	86:12 156:12	42:17,20,23	131:11 132:20	80:6,11
busy 139:6	158:9,10	43:16,17,18,21	135:21,25	challenge 76:4
C	224:20	44:2 47:23	136:15,20	challenged
c 3:1 201:24	capabilities	48:2,11,24	137:9 189:1	63:25
240:1,1	212:15	49:18 50:9	cause 70:18,21	chance 39:1
cafe 139:9	capacity 139:22	51:9,12,17,19	86:13 87:24	change 73:1
calculations	189:19	51:22,25 52:2	116:12,22	96:12 161:13
28:5 210:16	capital 220:6	52:8,11,13,19	117:12	241:8
California 3:20	capture 206:9	54:17 56:20	caused 85:9	changed 45:18
6:3 27:19 31:2	206:22	57:24 58:3	130:22 232:16	83:1,25 150:19
144:24	captured 196:21	59:21 61:12	causes 70:15	changes 46:20
call 7:25 27:22	196:25 206:16	63:2 71:3 74:7	causing 70:10	46:21 119:14
30:6,7,9,23	car 52:9	74:8 76:23	124:24	CHANGE/RE...
49:23 56:23	care 10:9,17,19	78:11,22 79:2	caution 161:3,11	241:8
64:15,15,17	11:2 51:14,19	79:17,22 80:16	164:18,20	channel 78:6,8
95:10 97:14	100:14 189:22	84:12,13	169:18 170:19	characteris
148:20,25	190:2,4 196:8	100:18 101:8	171:7,14 215:6	182:5
158:10 178:12	career 7:10	122:5 123:9,13	215:6 216:3	characteristics
198:16 235:16	229:14	123:17 128:18	221:12 228:15	119:18 143:17
called 3:6,23	careful 160:15	135:17 163:23	228:21,25	163:7 182:5
5:17 6:8 12:1	190:5 196:11	164:20 169:16	229:3,16	223:3
25:23 30:6	carefully 163:12	170:11,13,18	cautiously	characterizati...
34:21 51:9,22	caregiver 10:4	172:3 173:23	161:11 164:8	46:14 189:6
59:24 63:16	213:20	173:25 174:5,6	cell 208:8	characterize 8:1
79:2 91:21	caregivers 10:4	175:22 198:3	center 155:22	12:23 181:25
98:19 122:10	10:14	202:12 212:14	centers 193:17	characterized
141:1 148:14	Carpenter 26:2	220:6 222:20	certain 24:5	203:16
148:17 172:12	139:12,19	226:21 237:20	114:11 122:20	charge 27:18,20
207:15	150:1	cases 5:15 16:5	152:1,3 172:14	27:23 190:6
calling 198:7	carrying 214:18	28:11,17,20,22	212:9	charity 49:3,5
calm 153:23	cars 173:24	32:8 33:17,20	certainly 25:6	49:11 50:11
camera 205:15	carved 81:10	33:23 34:1	37:18 38:10,18	cherry-pick
206:5,6 208:6	carving 81:25	39:12 40:23	102:19 142:17	114:13
208:25 209:4	case 1:8 7:6 8:8	42:6 43:14,24	146:17 156:23	cherry-picking
Campbell 31:2	8:16,23 12:5	43:24 169:10	193:22 221:2	111:4
Campeau 240:2	12:17 16:1	195:2 217:5	228:1	child 10:6,9,17
240:15	17:15,21,23	categories 33:20	certainty 34:17	10:19,21 11:2
canoeing 120:20	18:1,4 19:4,15	34:1	35:20 36:13	12:9 25:25
canyon 34:11	19:22 20:6,9,9	category 33:25	82:22 92:14	71:10 73:9
54:18,25 57:15	20:17,17 21:22	70:1	186:6,11,21	103:18,22
77:20,20,23,25	21:24,24,25	causal 58:11	187:2	104:11,15,20
78:4,9,13,15	22:4,4,10	61:12 117:2,7	certificate 91:21	104:22 105:7
78:17 79:3,6	23:15,18,18	117:13,14,18	certification	106:6,8,15
79:15,20,23	24:1,17 25:8	118:18,20	91:18,20	107:10,16,18
80:2,8,13,19	25:10,12 26:25	120:3,6,10	certified 91:22	107:23 164:21
80:25 81:2,11	27:7 29:2,7,10	121:1,4,17,21	91:22 132:4,5	164:23 188:23
81:14,17,22	29:16,23 30:1	123:1 124:1,8	certify 240:2	189:10,22
82:5,7,12	30:2 33:22	126:6 129:19	241:3	190:2,3 193:9
	34:3 37:19	130:8,24 131:4	cetera 31:24	194:18 196:8

196:12 198:21 199:10,14,20 199:21,24 200:4,18,22,23 200:25 201:1 201:11,22 212:1,14 214:18,22 children 10:3,12 10:15,18,22 11:1,14,20,23 12:2 31:14,16 31:18,19 33:23 109:20 118:12 136:4 138:23 138:25 139:3 176:22 177:18 178:18 190:3 191:13,14,18 191:19,23 192:4,16,22 193:6 194:4,9 194:11 195:2,4 195:7,25 196:12,20 197:9,17 198:17 200:16 205:16 210:1 child's 190:7,19 197:20 child-rearing 10:1 Chi-Square 197:16,25 198:4 Chi-Squared 197:22 choice 91:21 217:18 choose 76:6 choosing 236:19 chose 62:14 78:15,17 92:16 92:22 circumstance 70:6 circumstances 70:9,17,21 119:24 134:15	146:21 147:1 citation 95:8 cite 178:21 179:21 cited 11:24 citing 95:2 city 1:9,21 4:3,6 25:25 80:6,10 97:3,21 98:2 99:18 100:1,10 100:13 101:5 101:10,17 102:3 109:24 110:17 111:9 112:6,7 113:9 113:18 114:22 125:8 131:16 132:17 135:22 148:2,7,13 149:23 177:20 179:19 180:8 180:13,16,25 181:5,10,14 231:18,22 236:10,13 city's 96:21 114:8 115:2 233:10 claim 10:5,8,16 10:25 12:8,14 22:1 33:13 34:6 42:18 100:13 101:17 129:1 161:19 claimed 11:19 38:4 46:2 claiming 8:4 34:3 claims 7:19 Clara 52:6 clarified 158:1 181:23 clarify 16:18 99:10,11 147:17 157:19 clarifying 116:25 152:10 classify 182:3 clear 34:2 61:2	65:10 77:12 80:19 90:22 91:13 138:7 156:14 164:5 180:11 217:3 233:5,6 235:12 clearly 20:25 54:2 100:11 121:24 158:20 159:2 236:19 client 13:24 52:22 134:22 229:15,18 clients 29:22 client's 29:10 cliff 136:2 224:22 225:16 225:18 close 172:21 191:16 192:22 194:10 195:4 199:4,11 201:21 212:24 218:24 222:17 222:20,25 223:19,21 closely 191:13 200:16 201:11 211:21 closer 109:15 136:21 175:14 177:14 180:9 180:18 181:2 181:11 218:25 225:14 closest 192:23 221:11,15,25 222:16 223:17 clutter 218:9,12 coaster 173:12 173:13,19,20 174:1,4,10,19 174:20,22 coasters 132:13 173:24 174:2,3 174:8,13,17 Coefficient 65:4 cognitive 10:13 100:24	coldest 166:15 Cole 12:3,3 color 217:18 coloring 229:5 combination 150:21 come 18:14 21:16 27:10 35:25 47:15 57:1 120:22 132:24 171:9 175:1,19 179:13 208:3 220:17 comes 11:1 24:4 32:15,18 103:1 coming 35:14 96:9 commencing 1:22 common 16:7,24 16:25 17:1,5,7 17:8,10,10 170:5 commonly 74:14 common-sense 17:2 communicatio... 80:11 companies 122:19 company 39:14 39:17 comparing 43:9 66:14 compelling 13:25 14:14,16 complete 123:6 240:8 241:5 completely 159:22 201:15 compliance 227:16 228:3 229:23 230:9 230:11,15,23 236:25 237:17 compliant 217:15,16 complicated	8:15 complies 217:1 226:9 comply 172:14 215:12,14,15 215:18,21 216:6 217:4,6 219:1,4 225:25 226:8 227:11 227:24 228:5 229:8 237:21 239:4 component 230:21 components 220:21 230:2 230:22 computer 140:11,14 con 175:14 217:15 concept 61:6 119:15 concepts 44:22 concern 53:11 99:24 111:21 114:12 162:24 concerned 77:4 concerns 50:11 conclude 116:8 123:25 concluded 122:25 133:12 239:11 concluding 134:3 conclusion 132:24 162:4 162:10,20 181:19 201:9 201:17 conclusions 35:19 37:13 50:10 63:24 82:21 conclusory 50:22 condition 70:9 conditions 50:15
---	--	---	---	---

195:18,21,23	17:10 21:7	60:6,8 66:14	11:11,14 13:13	146:11,12,14
conduct 122:13	78:9 104:10	context 43:8	13:14,20 15:4	146:23 147:3
125:5 128:9	118:15 121:17	49:3,10 71:8	17:8,9 18:25	147:14 152:2
133:9 134:4,19	122:12 143:10	111:23 112:23	19:1,23 24:7	152:20,21,23
134:23	164:15 197:3	114:2,14	24:21 25:17	153:7,11 154:3
conducted 40:15	203:10 227:12	128:15 175:22	26:9,23 30:14	154:14,19
98:23 100:2,4	considers 180:9	175:22 176:18	30:20,24 32:6	156:22,24
101:10 115:25	180:16 181:10	200:5,12 205:1	32:16,21,23	157:3 159:19
122:4 123:7,11	consisted 133:14	continue 172:8	33:14 39:15,25	166:19 167:2
123:24 124:5	133:18	236:23	42:7,13,14,18	167:15,21
129:5,7 132:24	consistency 65:4	contributes	42:24 43:2	172:9,12,13,16
139:17 148:13	216:11	70:22	47:5,8,11,14	172:18,21,24
175:15 201:3	consistent 29:10	contributing	48:25 53:20	173:5,10
conducting	29:11 34:13	70:10 128:11	54:2 58:17	175:16 177:18
18:17 38:23	58:9 86:9,12	129:10	63:23 66:25	178:13,19
220:18	86:21 87:6,11	contribution	67:9 69:8,16	184:4,5,15
cone 234:1,20,22	87:15 89:2	128:4	69:17 70:18,24	188:12,16,17
cones 234:5	171:24 172:3	control 10:22	70:25 75:15	188:19,24
235:2	183:18 218:1	72:18 136:4	76:10 82:24	189:20,22,23
conference	consisting 240:7	214:17	83:7,12,15,16	191:6,10,15,20
63:19 205:9	241:4	controlled	83:18,19 87:13	192:4 193:7
confirmed 151:3	conspicuity 33:6	163:19	88:14 89:6,8	195:13 196:1
152:19 183:24	constitute 54:24	control/display	90:23,24,25	202:9,10 203:2
206:19	57:9,14 167:17	33:12	91:1,3,4 92:16	203:6,7,10,11
conflicting	178:23 222:18	convention 13:8	92:17,22 93:1	205:23 206:1
105:18 183:16	constituted	conversant 7:15	93:12,17 94:10	207:5 213:3
connotes 229:10	170:22	conversation	94:14,15 95:20	215:6,9,10,19
cons 179:17	constitutes	24:25 62:9	96:4,7 97:11	215:20,22,23
consciousness	157:3 216:3	76:4	97:12,14,15,22	217:5,9,12,13
181:8	226:1	conversations	104:12,16,17	219:14,19,23
consequence	construction	25:15	104:20,24	220:12 221:10
216:22 217:22	33:10 151:3	converse 118:19	105:1,8,12,22	226:8 231:3,6
227:19	170:14 231:24	Conversely 15:6	106:3,4,6,7,10	231:9 240:7
consequences	234:20	coordination	106:13,17,18	241:5
44:4,6,9 50:13	consult 132:6	33:8	106:20,21,23	corrections
227:11,17	consulting 5:17	copy 14:6 26:13	107:2,6,8,9,14	241:7
consequently	6:7,10 30:24	54:13 112:2	107:20 108:1,9	correctly 16:15
154:17,25	32:1,4,19	141:21	108:13,14,19	54:21 55:2,7
189:2 201:13	39:15,22,24	corn 204:8,9	109:4 116:14	93:24 117:5
233:2	consumer 7:1	coroner 90:23	121:10,22	118:13 141:18
consider 52:12	33:10	coroner's 90:14	122:9,14 124:5	205:20 208:9
76:18 77:7,16	contact 25:18,20	corporation	124:10,14	224:8
78:13 92:24	26:10	5:23,25 29:14	125:20,24,25	cost 237:16
131:18,24	contacted 26:1,7	correct 3:14,15	126:2,9,13,14	costs 237:19,20
167:17 179:9	contain 226:15	3:17,23,25 4:1	127:2,7,23	coughing 218:25
181:14 232:25	contains 78:8	4:4,9,19 5:20	128:2,7,13	225:5
considerable	content 216:20	6:3,5 7:3,4 9:5	130:14 132:7	counsel 30:5,18
20:19	216:24	9:9,11,12,16	132:11,14	67:14 94:1
considered	contents 59:25	9:18,19 11:2	142:8 145:24	95:16,23 96:4

147:9	create 109:11,25	17:6 55:22	128:12,12	70:9 74:24
count 138:20	159:7	73:13 137:23	155:11 188:23	definition 40:8
139:4	created 78:7	144:4,4,10,10	189:1,4,11	40:12 64:5,6
counted 73:8	99:14 153:14	166:3 193:11	190:7,19	71:13,20,23
138:22 183:12	170:15	193:17 214:20	197:21 203:5	73:13,16,19,20
counter 171:22	creates 81:9	238:23	236:11	73:25 74:1,3
countered	113:19 167:1	danger 228:24	deaths 104:1,9	81:22 143:25
170:16	credence 157:18	229:4,8	107:24 118:12	144:1
counters 170:8	184:7,11	dangerous	Debby 35:5	definitions 17:8
couple 46:22	credentials 37:3	160:22	240:2,15	degree 10:23
65:9 69:1,2	credibility 18:9	Daniel 139:15	decide 42:2	11:10 34:16
89:12 138:10	18:19 19:3,14	data 50:10	73:20 161:4	35:20 36:12
166:13 193:1,3	19:21 20:1,3,5	122:21 123:5	decided 62:10	82:22 92:13
course 18:17	20:11 21:11,14	125:11 128:16	68:22	93:5 186:5,11
39:1 112:11	102:21,24	197:16 220:17	decision 19:3	186:20 187:2
115:8 153:5	103:1,3 105:25	database 130:5	123:16 149:20	degrees 37:25
185:3 212:16	credible 19:8,8	date 24:22,23	225:11,15	deliberately
court 1:1 17:17	20:8 21:18,20	60:1,2 68:1,3	decisions 9:15	82:1,4
32:7 47:21	24:10 114:5	82:23,24	deck 48:20	delineators
48:8 49:8,8,13	Crissy 66:6 69:8	147:11 150:20	50:13 169:19	235:3,5
49:14,18 50:2	83:11 149:14	151:19 153:13	170:2,5,20,22	demonstrable
50:6,7,9,20,21	186:12,21	165:4 201:16	171:6,15	54:8
51:6 52:1,11	202:8 205:12	241:20	232:22	demonstrating
52:20 53:7	210:10,10	dated 59:11	decks 170:6	237:8
76:10,11 197:2	critical 119:25	240:10	declaration	demonstration
198:10	147:5 210:18	day 49:23	49:13,21,22,23	197:8,13 201:5
Courtney 1:5	229:2,5	135:12,12	50:4,5,17,19	201:6
66:5 69:16	cruise 48:12,15	138:1,2 142:2	51:1,2	demonstrative
83:11,12 185:4	49:2,3,10	142:15 145:9	declarations	201:4
186:6 187:17	Cruz 3:20 198:6	145:19,21	49:17,19	denied 22:13
188:18 189:9	Cues 65:3	150:21 154:2	decreasing	denotating 40:2
197:20	Cure 50:14	155:11 197:9	226:19,20	40:9
courts 47:3,7,10	curiosity 145:17	201:15 203:2	deemed 53:1	denotes 229:10
47:13 76:18	current 153:15	224:12 240:11	103:6	dense 45:11
cover 92:10	currently 5:16	241:23	deep 44:8	142:24 163:9
covered 154:23	26:21 31:1	daycare 193:17	defendant 1:10	168:21
156:20 157:12	238:23	196:10 214:20	2:6 4:3 8:5	department
157:16 158:2	curriculum 30:6	214:22	51:13 55:5	198:6
159:21,22	30:23	days 106:19	defendants	depending 73:4
covering 156:17	CV 2:17 26:13	148:15	28:15	depends 212:18
157:7,21	30:9 33:17	deal 135:23	defendant's	212:19 225:14
159:17 160:21	39:6	233:12	55:9 95:16,23	depicted 186:22
160:22,23		dealing 44:18	defense 30:5	215:11
167:1,20	D	dealt 7:3	32:5,12 96:4	depiction 182:25
covers 56:14	d 3:1 201:24	death 70:11 80:7	define 8:11 70:4	deponent 241:2
167:16	202:2	80:12 98:2	71:5 72:20,23	deposed 23:16
CPE 1:14,19 3:5	daily 236:17	99:5 101:12,18	78:4 143:24	79:22
240:5 241:2	Dakota 1:2 2:10	107:25 108:17	153:3	deposition 1:14
crannies 195:16	2:19 15:19	117:17 124:18	defined 8:25 9:6	1:18,20 4:18

5:7 7:9,13	description 2:16	127:16 133:21	111:24 112:2	dispute 167:25
18:23 20:2	29:23 87:7,16	136:13 168:11	115:14	disqualified
22:6 23:5,8,11	88:8 89:1,2,4	168:20 191:13	direction 34:11	47:9,12,20
27:16,23 28:7	101:7 115:23	192:19 194:8	directly 153:19	disregard
28:25 29:7,12	118:1 120:19	199:9 207:13	192:15	157:18 184:7
51:16,25 66:5	121:2 130:3,8	229:21	director 110:20	disregarded
69:4,8,15	143:3 157:21	determined	dirt 234:19,23	184:12 203:21
79:17 83:10	211:6 216:21	19:21,25 20:19	235:11,14,19	distance 194:7
103:7 108:18	descriptions	24:9 80:24	disagree 14:7,16	194:12 199:11
108:23 110:3	18:25 80:20,21	146:6	37:4,9,21,22	200:19 201:21
110:10 111:25	86:1 115:17,25	determining	38:5,16 181:19	205:12 209:12
179:25 180:19	119:14 120:23	43:6	238:25	221:22 224:1
185:4 202:23	143:8	development	disagreed	distinguish
239:11 241:6	descriptive 79:8	10:21	110:11	156:8
depositions 5:10	79:10 143:16	developmental	disagreeing 38:1	District 1:1,2
7:17 22:20	design 33:9	12:3	disagreement	48:8,8 49:7,8
23:2,6 31:7	231:3,13	Diane 48:4	38:11 46:15	50:8,21
84:1	233:14	dictionary 74:24	discerned 82:18	divide 27:10
depth 152:22	designed 55:10	died 185:9 186:8	discipline 13:25	DIVISION 1:3
derivation 73:6	238:7	186:14 189:10	91:14 92:25	DJC 241:25
derived 12:9	designing 8:12	differ 223:3	disclosed 62:2	doctor 3:25 13:3
122:24	12:2 232:13	difference 66:13	62:19	13:7 53:19
des 207:23	destination	81:11,14,17	disclosure 102:3	115:13 185:2
describe 76:1,22	48:18	208:21 210:15	102:4,18	188:8
80:23 81:24	detail 18:7 82:13	210:17 218:4,8	disclosures	document 14:11
84:22,22,23	216:24	218:11,14	96:23 102:5,8	30:4,16,22
85:23,25	detailed 18:3	differences	102:12	59:24 96:21
101:20 116:4	30:7	218:21 226:10	discover 15:2,9	112:1 140:24
137:5 201:24	details 32:17	different 17:7	15:13,15 16:10	141:1,19
227:10,17	detect 73:1	37:13 43:17	discrete 106:23	148:20 149:1
230:1	detective 90:25	60:18 63:8	discuss 21:1,1	documentation
described 11:7	139:12 148:3	64:10 70:25	57:20 98:10	19:23 22:25
34:12 58:18	149:18,24	77:1,14 79:19	118:8	documents 6:25
86:11 87:12,15	150:4,7,22	83:2 84:21	discussed 62:6	24:18 27:9
100:5,10 108:2	152:14 153:2	86:9 91:17	83:5,8 124:12	36:20 56:22
118:8,10	153:18 154:5	100:22 119:19	discussing	63:13 67:25
120:14,24	155:2 157:10	134:24,25	114:20	80:5,11 82:18
121:6,11,18	157:14 158:10	170:25 192:3	discussion 13:5	102:7,11 103:5
126:17 129:15	158:14 181:15	217:18 225:8	59:15 60:15	139:1 155:5
141:1 142:22	determination	237:2	64:3 228:11	221:14
142:25 143:11	111:19 206:4	differently 16:8	234:12 236:5	doing 17:15 27:8
145:6 201:7	determinations	differs 73:4 74:1	discussions	57:3 60:16
207:24 217:23	19:14	difficult 59:4	114:13	62:25 66:20
describes 56:16	determine 20:2	167:8,9 168:11	display 71:17	73:3 97:5
73:21 100:17	35:1,9,11	168:19 192:17	220:19	102:4 105:18
describing 46:24	38:21 52:18	231:12	displayed	106:6 119:22
64:23 77:12	64:13 73:12	digital 208:19	218:24	135:10 136:13
115:24 120:13	114:4 117:19	208:21	disproven 46:3	195:5 220:18
130:6	126:11 127:4	direct 91:8	46:4	232:2

dollars 26:20 28:6	129:8,8,20 130:25 132:19 135:20,20 152:11 232:15	effect 119:16 129:15 130:22 204:12 218:13 218:21 219:5	211:23 empirical 197:13 220:18	8:19 100:25 101:1 169:4 170:9 235:11 235:12,20
Don 110:15,17 236:12	due 148:15 232:16	effective 46:12 55:11 127:1,17 172:17,18	employ 73:20 employed 75:6 110:17	Environments 12:2
door 171:8,9	duly 3:7	217:2 218:6 219:3 220:2 222:12,18	employee 6:5 employees 148:7 148:13 149:22	ergonomics 13:9 13:16 72:8,17 74:16 75:21 91:18,22 132:5
Doug 236:11	duty 51:14,19 188:19	223:8,20 224:3 226:2 227:12 230:2,6,22 231:8 236:4,24	employment 5:12	error 42:9 43:6 43:13,22 207:25
downstream 155:20	DVD 67:18 68:2 90:8,11	effectiveness 127:4 226:13 226:20 230:2	encounter 168:25 171:9 205:5	Especially 172:1
Dr 2:14 4:2 8:3 35:6 42:20 47:2 132:18 209:21	d.ii 200:16 D3 209:7,9	efforts 50:14 effort 52:18,25 126:10 134:22 139:4	encourage 41:22 encouraging 218:17	essence 32:5 establishing 198:9
draw 109:14	E	effects 50:14 effort 52:18,25 126:10 134:22 139:4	ended 103:19 ends 159:14	Estate 1:6 estimate 196:2 207:13 222:15
draws 50:11	E 2:7 3:1,1 240:1,1 241:1 241:1	efforts 130:17 130:21 131:13 131:17,20	enforcement 9:18 78:22 90:25 91:2 130:12 134:7,9 156:2	Estimates 125:8 estimating 207:6 et 31:24 80:6,11 evaluate 18:13 18:14,24 25:7 28:18 41:9 75:9 85:25 103:1,3 104:3 110:9 112:23 112:24 128:25 136:8 152:6 164:22 174:23 212:14 229:25
driven 137:24 144:6 145:5	earlier 45:7 62:7 86:11 90:5 99:11 135:24 157:20 215:14 233:21 237:1	eight 192:3 195:25 212:21 213:14	engaging 14:17 engineer 82:20 132:3 151:1,14 189:19	et 31:24 80:6,11 evaluate 18:13 18:14,24 25:7 28:18 41:9 75:9 85:25 103:1,3 104:3 110:9 112:23 112:24 128:25 136:8 152:6 164:22 174:23 212:14 229:25
driver 33:6	early 127:10 168:5	efforts 130:17 130:21 131:13 131:17,20	engineering 91:12,14,16 92:2,2,4,5,10 92:14,20,25 93:4,6 172:16 219:13,18,22 220:11	evaluated 19:25 38:23 96:8 133:25
driveway 171:6	earth 78:6,8 82:2	either 19:7 20:10,10 83:20 89:4 100:23 117:22 128:11 137:6 149:25 165:9 185:25 205:7	engineer's 151:8 English 146:9 enter 102:24 entering 87:2 entertain 23:24 181:5	evaluating 20:5 99:16 102:25 103:23,24 128:3 219:8,10 evaluations 40:25
driving 235:4	easier 207:16	eliminate 98:21 eliminated 136:23,23	entire 50:3 128:19,24,25 179:16 222:25	event 50:16 64:5 64:12,13 71:15 72:22 73:2 104:18 106:19 117:15 118:1 119:9,10
drop-off 78:18 78:19,24 82:6 154:13 157:7 159:4,25	easy 30:11 57:25 58:11	elaboration 61:11	entitled 47:23 entrance 170:20 171:6,14	
drown 227:1,2	Economics 13:9	elaborations 61:23	environment	
drowned 100:3 104:16 107:22 118:9	edge 54:18 77:25 150:23 156:7 160:6 164:5,6,17 167:7,10,11 169:19 180:10 180:18 181:2 181:11 205:19 206:5 222:10 222:21,23 224:7,20 225:7	eliminating 98:6 email 2:20 26:12 67:15 69:13 236:9		
drowning 2:18 25:25 80:1,1 97:22 104:19 113:16 115:4 117:3,22 118:18,21 119:2,5 120:6 120:11 121:5,7 121:9,21 123:2 124:1,7 130:16 131:5,11 132:18 152:23 226:24 228:14 228:19	edges 58:7 182:9 educate 8:9,21 9:3,10,17,20 9:25 15:1,7,18 16:4,8,23 17:14	emotional 44:8		
drownings 110:7,24 111:15 113:16 115:4,18,25 116:5 117:19 117:20 119:5 122:6,6,24,24	educating 17:20			

Page 251

125:22 130:8 136:21 198:1,2 212:25 events 43:19 64:16 68:18 71:16 117:12 119:25 120:19 eventually 86:8 152:14 206:13 everybody 30:10 90:22 evidence 17:12 18:10,13 20:8 20:13,15,16,16 20:19,20,21 21:7,7,8,11,12 24:6,6 41:9 44:1 100:9 103:4 109:13 177:1,10,10,24 178:13,21 188:20 190:23 191:2 198:8 evidenced 24:1 evolutionary 46:20 96:10 evolves 46:12 evolving 45:14 ex 11:6 exact 37:3 exactly 121:3 159:14 160:5 206:3 exam 91:19 examination 2:13 3:9 82:23 133:20 examine 23:20 examined 2:14 3:7 example 15:16 60:22 65:20 91:17 94:8 96:20 103:7 110:10 114:23 126:22 205:2 examples 13:17 37:24 237:6 exchange 194:20	exclamation 218:15,20 exclude 52:23 excluded 52:3 52:12,20 exclusive 61:17 excuse 83:11 91:10 119:2 162:13 164:24 218:25 exercise 205:17 exhibit 2:15,16 30:4,22 39:6 54:14 82:15 115:14 155:13 155:16,25 158:20 159:9 159:20 160:24 163:23 182:23 186:23 200:15 205:22,25 206:18,22,23 211:15 213:25 215:11 217:12 218:2 234:13 234:16 236:1,6 exhibits 3:2 23:5 23:8 194:16 existed 141:3 146:21 147:2 195:19,20 expand 60:23 179:14 expansion 61:5 expect 123:15 154:1 159:25 expectation 123:21 162:16 162:25 169:21 170:9,17 171:20,23,24 235:21 expectations 170:8 235:12 235:13 expected 15:2,8 15:19 16:10 201:10 expenses 27:20	experience 16:7 30:8,14 31:25 37:3 43:1 94:21 135:8 168:18 191:6 238:15 experimental 3:16 11:17 45:24 46:18 75:21 82:19 91:12 92:8,9 94:19 189:20 198:6 expert 7:19,23 8:4,5 9:23 10:16,25 12:8 12:21 14:25 15:10,17,24 16:4,8,12,13 16:22 17:5 28:8,12 36:24 47:3,6,9,12,19 48:1 53:8,19 54:7,11 90:17 99:23 132:22 165:7 190:1 expertise 10:5,8 11:2,7,17,19 12:14 17:5 31:17,20 33:13 37:20,22 38:4 38:16 54:8 82:18 186:11 186:21 189:22 190:21 191:6 193:15 experts 13:11,23 37:12,19 38:16 77:1 expert's 43:7 explain 57:11 74:6 75:14 87:2 explained 9:7 13:22 explaining 7:22 explanation 171:2 explicit 226:15	226:21,25 227:2 228:4,7 explicitly 227:17 233:17 express 99:23 expressed 36:4 43:14 97:25 expressing 92:12 111:21 extensions 57:7 extensive 45:4 137:3 extent 216:22 extra 218:9,12 extrapolating 207:12 extremely 190:5 Eyeballing 222:5 F F 240:1 face 103:17 fact 7:22 8:9 12:22 13:18 16:5 17:10 20:4 35:16 45:6 46:7 79:12 85:20 99:4 110:23 113:18 119:11 137:7 147:2 160:14,20 162:3 169:10 169:12 173:17 182:24 185:22 188:14 225:17 226:7,14 236:21 factor 58:12 61:12 111:15 113:7,15 115:3 117:2,8,13,14 117:18,21 118:5,6,16,18 118:20 119:4 120:3,6,10 121:1,4,17,21 123:1 124:1,9	126:6 128:11 129:10,19 130:9,16,24 131:4,11 132:20 135:22 136:15 137:9 189:1 factors 2:18 8:10,11,12,22 9:1,4,22 12:1 12:21 13:9,16 13:18,22,23 14:20,23,25 15:15,17,24 16:1,13,22 17:4,14,20 25:7 32:1,3,18 37:5,12,14,19 38:22 39:15,24 40:15,25 43:7 44:22 45:4,14 45:17,23 46:2 46:15 57:25 64:1 71:19 72:3,5,16,18 72:19 74:16 75:3,7,21 82:20 91:12,14 91:23 92:14,19 92:25 93:6 94:19 117:10 123:19 124:24 125:1 129:23 132:3,21 135:25 136:20 165:8 185:21 189:19 216:12 225:19,23 226:1 227:9 230:17,19 232:10 Factors/Ergon... 13:11 factors/ergono... 33:4 facts 50:10 56:8 82:17,18 85:19 85:23 87:17 162:4,19
---	--	--	--	--

187:16 191:5,8	81:6,6 86:17	126:2,12,18,19	fences 182:18	finished 216:16
factual 192:11	98:25 99:4	127:21,22	fencing 98:11,12	firm 39:15
failed 49:9 55:15	100:2,2 101:10	129:9 175:1,9	231:18 232:7	first 3:6 7:13
99:18 176:25	101:18 106:20	175:14 177:13	233:16 237:25	25:18,20 57:8
188:15,18,21	107:12,18	federal 47:7,13	238:2	63:15,17 65:1
189:9 201:21	109:9,24	47:20 49:8,18	fewer 237:14	78:22 79:25
201:22	110:18 115:19	50:2,8,21	field 12:20 37:2	84:8,8 91:11
failing 189:3	116:1 122:9	feel 29:25 33:21	37:9,17 38:17	93:15 114:22
227:17	125:6,22	179:13,15	38:19 45:3,13	115:24 116:20
failure 55:4	128:19 129:2,9	feels 53:7	45:14,17,20,22	122:3 124:22
188:25	132:17 137:20	feet 153:4,10	46:2,12 64:1	132:23 137:21
fair 5:11 7:15	137:21 152:2,4	155:7,9,17,23	71:19 72:5,19	137:23 164:8
8:23 19:13	165:9,10,14,25	170:3 171:17	74:15,18,24	231:2
20:18 29:4	166:16 175:1,9	174:7 176:10	75:7,8,20	first-year 198:5
37:8 46:1 56:5	175:13,13	193:1,3 198:18	100:21 186:6	Fischer 155:16
63:22 116:2,5	177:12 178:16	198:21,24,25	186:11,21	236:3,4
139:8 144:17	180:8,14,16	200:18 205:18	205:6 207:8	five 27:17,22
176:23 178:9	181:24 186:23	205:19 206:4	219:13 229:14	38:25 41:4,16
224:12	191:9,23 195:9	208:1 210:19	fields 204:8,10	55:20 56:2
fall 2:18 10:19	201:12 205:10	211:6,12	204:17	199:1 210:19
34:12,13 36:10	218:24 232:20	212:22 213:11	fifth 210:21	211:3,6,7,12
36:21 51:24	236:10,14,15	213:14,19	fifty 26:21	211:22 213:22
58:4 62:5,7,12	236:18 238:23	221:13,15,20	figure 67:1	flat 38:13
85:9,24,25	238:23	221:23 222:3,9	116:16	flood 231:25
86:2,10,14,15	false 21:19,21,22	222:16,22	file 4:12 27:6	Florida 48:14
86:18 87:3,21	22:1 23:17	223:18,21	59:22,24 60:6	flow 152:22
87:25,25 88:7	24:1,15	224:23 225:1,1	60:8 66:14	flowing 54:19
88:8,11 89:5	familiar 4:18	225:13	files 150:25	55:1 57:16
103:16 113:20	7:18 47:23	Feist 25:23	final 35:19	153:7
118:3 121:13	170:4 206:24	fell 25:25 34:3,7	82:21	fluffy 142:20,22
130:22 136:2	225:22 230:24	34:18,21,25	finally 206:21	142:25 143:1,7
144:7 152:4,20	families 138:22	36:14,19 78:23	financial 44:6	143:11
154:17 164:11	138:24 142:12	85:19,21 86:7	202:11	flume 81:15
224:11,19,20	family 142:11	86:8,21,23	financially	foam 34:22
224:22 227:7	far 26:24 27:9	88:6 104:20,22	29:13	54:23 57:13
fallen 105:11	29:2 193:4	104:24 106:12	find 53:1,7	58:5,6,11,14
106:9	221:11 225:13	107:2,6,18	96:18 99:21	61:11 80:21,22
falling 33:24	229:2 237:14	116:19 150:3	102:2,14 114:5	86:7 103:19,23
84:4,14,19	farther 136:22	152:16 153:14	174:16 190:11	105:8,11,21
86:9 87:9,10	fatal 130:4	155:21 221:22	197:16 198:3	106:3,16,16,22
87:20 91:7	fatality 117:13	221:25 222:17	206:21	107:11,13,17
103:20 116:11	favorable 29:15	222:18 223:18	findings 18:4,18	107:20 109:8
120:20	Fazio 63:15	223:24 231:19	197:17	109:11,14,21
falls 1:9 2:10,19	feature 119:25	231:25	fine 53:15 61:21	109:25 110:4,6
2:19 4:4,7	233:15	felt 60:14 75:14	75:1 78:25	110:12 111:8,9
15:18 17:6	features 8:18	female 210:21	finish 86:4 130:6	111:15 112:16
33:8,17,24,25	207:17	211:8	137:15 169:25	113:9,15,19
34:1 55:10,22	featuring 182:11	fence 28:14	171:3 197:24	114:24 115:3
79:14 80:7,10	February 125:6	238:3	199:7 204:15	117:2,21 118:1

118:5,17,20	232:17,17,20	109:9	Friction 65:5	62:11,11 123:6
119:3,9,10,11	232:25 233:6,9	formatting	friend 236:14	177:9 179:16
119:15,17,20	233:12,16,17	217:7,20 218:1	front 4:15 30:3	179:19 180:1
119:20,21,21	233:21	226:11 230:18	158:3 171:9	220:14
119:25 120:2,5	focal 208:12	230:20	186:23 229:23	Gill's 25:3,17
120:10,16,25	209:10	formed 30:23	234:22 236:1	36:22 43:10,24
121:4,12,16,19	focuses 91:17	forming 102:20	full 84:8 98:25	44:16 176:21
121:20,23	folks 13:22	forms 12:8	139:9 200:2	178:11 188:11
123:1,25 124:8	30:11 170:14	Fort 48:13	240:7 241:5	girls 109:17,18
125:21 126:6	follow 41:23,24	forth 83:3	Fuller 2:8 25:24	206:17
126:20 127:20	42:2 74:2	194:19	fun 237:20	give 27:12 28:7
128:4,10,14	113:11 218:14	Forty-five 26:20	fundamental	28:25 29:12
129:2,9,19	230:18 237:2	Forty-one	172:15	47:19 52:19
130:6,8,15,20	237:13,14,22	121:23	further 129:7	56:6,12 126:21
130:22,24	followed 230:4	forward 29:12	160:15 161:1,4	157:17 167:11
131:4,10,18,20	following 1:18	34:11 35:25	future 60:25	184:6,11 237:5
131:24 132:20	53:8 110:7	52:14 66:18	104:6	given 5:10 16:2
132:24 133:10	220:22 234:3	86:7,8,14,16	F-A-Z-I-O	21:10 24:5
134:4 135:21	237:16	86:17,21,23	63:15	73:25 86:1
135:21 136:5	follows 3:8	88:5,6,6		88:8 105:25
136:10,15	follow-up 28:4	137:11 154:9	G	111:22 145:18
137:2,6 142:12	font 220:6	159:4	G 3:1 241:1,1	171:20 175:25
146:13,16	foot 142:20	found 49:8	gait 84:19	194:7 205:1
148:16 153:14	156:18 164:9	80:15 131:10	161:13	236:20
154:6,10,12,19	208:2 210:14	135:19 206:18	gap 81:18	gives 99:22
154:23,25	210:25	foundation	Garrett 109:20	giving 7:17 29:7
155:3,6,16,21	foregoing 240:6	84:23 131:15	130:22	51:16 193:5
156:15,17,20	241:3	134:3	gathered 195:16	global 38:3,7
157:3,7,12,17	forensic 5:15 6:8	four 4:22,23	geared 39:23	go 11:3 20:17,24
157:21 158:2,8	14:20 32:1,18	26:21 49:16,19	general 8:6	21:24 22:4,22
159:10,14,17	39:14,23 40:1	92:11 109:20	20:23 25:8,24	23:18 29:2
159:21,22,23	40:7,8,14,25	126:19 155:7	28:19 100:23	32:8 41:8
160:3,4,5,11	43:7 44:22	156:11 171:21	109:22,23	52:14 60:17
160:12,18,18	64:4 90:17	173:22 192:20	124:16 212:9	64:22 82:13
160:21,23	forensics 39:20	198:25 199:1	237:14	92:18 101:25
161:1,7,20,21	foreseeable	210:25	generally 92:19	116:4 126:11
162:16 163:1,5	50:13	frame 206:7	115:16 219:7	134:24 135:9
163:25 164:7	Forest 238:18	Francis 31:8	219:17,21	161:1,21
164:14,15,17	forget 170:13	Francisco 5:19	220:11	164:23,24
167:1,16,20	forgot 90:12,13	31:10 144:14	generate 98:20	166:7 168:6
175:2 176:1,22	90:14	freely 150:7	generated 22:9	173:18 177:19
177:12,17,22	forgotten 39:5	153:7	generating	185:2 200:7
177:25 178:18	form 29:1 74:4	freeze 165:11	96:11	201:8 216:24
179:10 180:3,4	94:14 96:6	167:23 168:3	germane 33:22	224:6 225:6,11
180:6,9,11,17	131:15 193:9	freezes 164:25	getting 104:19	230:17 237:24
181:1,6,10,16	202:4	165:9	ghost 89:4	238:4
195:10,11,12	format 216:19	frequency 63:18	giant 23:3	goes 56:21
195:16,23	218:6,21 221:1	125:2 198:2	Gill 24:20 25:9	114:25 173:19
231:14,19	formations	frequently 37:10	42:20,21,22	180:3

going 29:6 31:18 49:2 53:14 56:6,12 65:12 66:18 88:17,19 88:24 97:10,20 99:22 100:1,12 101:9 107:23 112:5 113:11 113:23 115:22 137:10 146:6 147:23 161:16 163:22 182:22 194:20 197:2 198:10 228:9 234:20 236:9 237:18,22	guarding 182:10 182:17 231:16 232:22 238:12 238:16 guess 15:21 29:17 72:6 111:11 118:24 163:10,25 168:22 178:24 189:5 218:9 226:23 234:3 guessing 53:23 168:16 187:21 guidelines 238:9 guy 179:21	54:24,25 57:14 57:15 58:6,7 58:14 70:4,8 75:17 86:21,22 97:22,23 98:1 98:3,7,13,15 98:25 99:4,15 100:2,5,8,11 100:13,19,22 101:4,17,21 110:4,7,14,23 110:24 111:8 111:10,12 112:7,8,10,16 113:10,22 114:10,11,24 115:23 119:12 119:14,15,20 119:20,21,22 120:2 122:13 122:14,18,22 124:17,20 131:14,18,20 131:21,25 132:7,11,22,25 133:4,9,12,13 133:16,17,21 134:4,19,23 135:10,23 136:2,2,3,11 136:23 137:2,4 137:6 152:20 152:23 154:17 157:3 164:15 164:16 166:19 166:22 167:2,5 167:12,17 168:25 169:12 170:15,22 171:16 172:5 172:11,21,24 173:2,3,6,8,23 174:5,11 180:4 216:21 217:22 225:9,16,17 226:16,24 227:11,24 228:15,19 229:10 231:3,5	231:9,13 232:25 233:6 233:19,22 234:1,6,8 hazardous 55:6 128:20 hazards 7:1 54:20 55:12 71:11 86:13 98:4,5,6,18,21 99:17,19 100:5 100:6,9,18,25 101:7,20,22 103:24 104:4 128:15,25 130:3 152:1,3 152:6 164:22 167:19 173:9 214:4 233:1,4 233:7 head 89:10 heading 32:1 54:16 115:23 164:23 hear 153:9,15,21 heard 72:8 178:17,17 heed 227:18 height 78:12 152:19 154:18 155:3,18 210:15 211:9 held 45:17,19 help 13:3 15:10 15:25 29:23,24 30:1 94:14 234:5 helped 96:6 117:12 helpful 50:22 77:14 150:1,2 150:12 162:22 169:4 HFE 5:17 6:7 30:24 39:22 hidden 173:2,3 173:8 hide 109:8 hiding 136:11	hierarchy 230:25 231:2 high 106:16 107:13,19 142:17 159:23 231:19,25 232:17 higher 158:8,15 highlighted 14:9 highly 225:19 hindsight 57:21 57:21,23 58:9 58:15,20 59:2 59:5,15 60:15 60:21 61:8,17 61:19,20 64:3 64:7,10,10,14 64:15,17 156:24 157:8 hindsight-bias 61:6 hired 4:6 22:16 24:17 25:4,13 29:6 147:3 history 202:14 203:13 hold 3:13,22 14:17 131:3,12 131:12 172:8 236:23 holding 214:17 holes 33:24 Holland 47:24 48:13 home 171:25 172:1 hook 27:25 hopping 238:3 hour 26:22 28:7 hours 26:24 27:7,11,12,15 27:22 28:6,6 63:21 138:6,10 Huber 2:12 huge 142:13 Huh 68:9 human 2:18 8:9 8:11,12,22 9:1 9:4,22 12:1,21
--	--	---	---	--

Page 255

13:8,11,16,18 13:22,23 14:19 14:20,23,25 15:15,17,24 16:1,12,22 17:4,14,20 25:7 32:1,3,18 33:4,4 37:5,12 37:14,19 38:22 39:15,23 40:15 40:25 42:15 43:7 44:22 45:4,13,17,23 46:2,15 64:1 71:19 72:2,5 72:16,18,19 74:15 75:3,7 75:21 82:20 84:4 91:7,12 91:14,22 92:13 92:19,25 93:6 94:19,20 123:19 124:18 132:3,21 165:8 185:21 189:19 216:12 225:19 225:23 226:1 227:9 human-factors 91:15,16,20 92:2,3,4,5,10 172:15 219:13 219:18,22 220:2,8,11,17 220:23,24 221:7,9 human-machi... 33:11,19 hundred 5:14 6:13 7:9 26:20 26:21 27:12 28:11 193:1,1 193:3 221:15 221:23 225:13 230:10,14 hundreds 139:6 hypotheses 96:11 hypothesis	198:9 hypothetical 126:22 <hr/> I <hr/> ice 161:12 164:24 165:3,5 165:13,19,22 165:24 166:1,4 168:6,12,12,19 168:20 idea 76:7 150:5 150:6 166:8 177:15 192:24 202:13,16,18 202:20 212:13 233:17 identi 104:4 identical 183:4 identification 3:3 98:18 234:14 236:7 identified 54:2 61:4 63:6 94:9 94:13 95:24 96:3,17 104:4 110:7,8,24 113:9 119:12 125:1 129:24 137:5 150:3 151:5 152:1,15 153:2 154:18 identifies 82:16 identify 19:2 56:12 57:25 85:20 94:25 95:15 99:18 100:25 112:9 113:18,21 139:20 identifying 58:6 98:4,4 ignore 73:19 169:7 236:19 ill 147:14 illusory 63:14 63:17 119:16 illustrate 236:16 illustrates	238:21 imagine 137:3 142:19 168:19 176:7 190:16 impede 77:5,9 impeding 130:20 implication 199:16 implications 29:17 implied 161:19 implies 88:5 imply 226:24 importance 73:2 important 17:21 44:3 53:4,6 73:4 80:23 151:11,14 169:8 210:18 218:17 importantly 19:8 inaccurate 17:2 inadequate 201:17 214:2 214:24 235:8 inadequately 188:10 211:17 inadvertently 84:17 inattentive 202:17 incentive 202:12 inch 142:16,17 inches 159:5 163:23,23 164:1,4,10 incidence 176:1 incident 8:10 18:15,16 57:24 58:3,9,10,12 80:20 83:14 97:19 103:9,11 103:14,18,20 103:21 104:7 105:6 109:6,21 110:3,5,14 111:10,12	112:8,17,17 113:8,9,21 116:24 117:11 117:23 119:16 120:17 121:17 124:2,7,9,23 124:25 129:25 130:14 131:5,7 131:11,25 132:1 135:3 136:1,24 137:8 137:10 142:3 142:15 150:15 150:20 165:4 178:1,18 181:4 181:8,14 183:19,23,24 186:16,18 224:12 incidents 33:18 33:18 104:5,6 109:16 113:8 116:10 117:3,9 118:3,19,21 119:6,19 120:4 120:7,11,14,24 121:5,8,9,22 122:20 123:2 124:21,22 126:6,17,17 129:6 130:4,12 135:25 136:8 136:14 137:8 233:8 include 5:7 8:17 62:8 67:4 84:11 93:13 116:17 included 63:20 68:20 91:6 94:6 102:7 108:12 118:3 including 33:9 78:22 109:18 116:23 132:13 211:3 inclusion 217:21 income 32:15 incompletely	160:23 incorporate 61:13 incorporated 220:4 221:7 incorporates 219:17,21 220:10 221:9 incorrect 17:11 increase 227:15 228:3 incremental 46:16,19 independent 52:25 130:25 232:25 independently 233:7 INDEX 2:13,15 indicate 10:2 41:9,20 43:20 101:6 109:19 116:10 137:2 160:12,25 214:16 indicated 10:11 117:24 181:1 205:17 215:13 indicates 41:17 47:2 129:22 226:18 indication 174:9 individual 23:15 Individually 1:5 individuals 24:2 98:23 104:14 234:6 industry 122:19 ineffectiveness 238:22 influenced 157:8 inform 97:9 172:4 information 16:6,24 21:15 21:17,18 22:9 22:12,16 25:24 31:5,13,15
---	--	---	--	---

32:20 35:25	194:9 216:21	222:1	68:7,10 71:24	87:15,21 88:16
58:2 82:23	217:22 227:19	interview 134:9	80:6,11 83:18	105:15,22
87:21 88:25	228:7	140:24 148:23	89:23 90:6	106:2 109:17
94:20 96:8,16	instructions	149:11,13	93:20,23 94:1	206:8,20
96:23 102:19	193:5,8 194:3	interviewed	108:9,17,22	211:13,19
102:25 103:4	194:15,25	134:12 149:5,8	215:16	212:21 213:1,3
108:7,12,15	226:15 228:5	interviews	issues 8:10,22	213:10,17
123:19,22	insufficient	148:13	9:4,11,13,18	Jeremy's 87:6
125:18 129:14	171:15	inverted 174:1,2	9:21 10:1,10	87:16 88:4,8
129:16 137:1	insufficiently	174:4,22	16:1 17:9,14	89:1,2,3
148:16 151:10	50:22	investigating	17:20 20:25	105:20,24
178:3,6 179:25	insult 211:2,5	40:18	25:7,9 46:14	212:24
180:2 226:18	intend 36:5	investigation	49:14,15 50:20	Jesus 147:22
227:21 228:6	55:21 56:2,12	18:18 40:4,10	51:5 52:14	Jim 53:13
informative	56:20 60:16	40:15 44:24	84:13 92:3	147:14
87:24	61:6,18 62:3	investigations	97:11 98:11	job 101:1 114:16
initial 96:23	62:18,25 63:4	40:25	102:5,6 103:2	235:8
102:3,4,8,12	65:11 66:20	involved 23:16	136:5,18,25	Joellen 24:20
102:18	99:24 101:16	49:4 58:3,12	226:12 230:20	Jordan 25:23
injured 48:23	intended 60:24	80:16 102:5	issuing 73:15	judge 16:5 17:17
118:9 169:3	76:2 123:4,8	103:18 116:12	item 96:17 158:7	52:1 76:23
174:10	intending 99:3	116:18,22	162:13 202:1	77:5 102:21
injuries 31:23	intention 34:16	136:14	items 22:25	judged 19:7
51:15	interact 106:3	involving 10:9	95:20 96:2,17	215:25
injury 8:10 70:7	interacting	33:17 37:5,13	220:25 226:2	judgements 18:9
70:11,15,21,22	103:19,22	52:8 80:1	it'd 190:10	18:19 20:11
117:11,12,17	105:7,11	103:10	231:12	judgment 20:6
124:18,24	107:11,17	Iowa 144:4,6	i.e 32:19	judicious 169:8
125:2 128:12	interaction	204:16		Jul 59:11
128:13 130:4	33:11,19	Irlbeck 86:2,6	J	July 96:24
136:24	interactions	irrelevant 103:6	J 240:2,15	137:20 138:17
input 149:17	33:11 195:6	195:1,6	jacket 138:9	146:5,10
inside 214:23	interest 96:14	island 120:22	jagged 164:17	147:11,19
insignificant	interested 77:11	issue 17:11	167:8	201:3
226:11	109:21 171:5	23:19 43:9	James 2:7	jumped 88:19
inspection	Interesting 68:9	49:22 56:3	Jan 2:17	88:24
139:17,18	interface 8:16	59:6 74:5	January 127:16	jumping 89:1
140:22 152:18	interpret 174:25	76:25 84:18	127:18	June 59:11 68:1
installed 55:10	175:2 176:15	94:25 95:13	Jayne 1:5 66:6	68:4 82:24
instance 19:15	interpreted	110:8 113:4	69:16 83:12	83:4 93:23
92:24 137:6	163:6 174:24	126:23 136:10	85:6,11 183:25	139:17 147:12
184:10 207:18	interpreting	136:19 168:24	186:6 187:17	147:21 148:1
207:21 231:11	176:17	169:12 170:4	188:21 189:2,9	148:12 151:25
instances 19:17	interrupt 147:10	172:24 173:25	197:20 201:9	153:19 154:6
19:19 116:17	interrupted	176:21,23,25	201:21 213:8	181:23,25
117:20 198:1,2	99:12	177:4,8 178:12	Jayne's 185:4	191:10 195:9
instruct 76:11	interrupting	188:11 229:22	Jer 212:23	201:4 214:6
instruction	199:7	233:20	Jeremy 34:12	juries 13:11
193:18,22	intersection	issued 24:20	86:2,6 87:12	15:11,12 76:19

Page 257

76:20	232:19	118:15 119:7	197:25 198:3	Ladder 7:1
juror 15:18 17:6	kinds 100:22	119:17,19,23	198:13 199:6	ladders 7:3
jurors 15:1,7	168:17	119:24 120:2	199:11 200:10	laid 61:16
16:9 17:22	Kirby 139:19	120:13,18,18	202:11,14,21	189:24
jury 8:11,21 9:3	Kirkus 2:20	120:21,21	203:15 204:22	Lakes 167:22
9:11,17,20	236:12	124:22 125:3	205:4,7 208:11	240:10
10:1 14:18	knew 112:6,7	125:10,16	208:13,16,18	landscape 9:21
15:14,25 16:5	148:18 170:12	127:15 128:3	208:20 209:12	9:23
16:23 17:14,20	196:17 200:2	130:5,6,7,21	210:2,12 211:9	large 106:16
34:2 55:21	know 5:2 8:17	132:16 133:2,5	211:20,20,23	113:19 151:3
73:18,25 74:2	13:12,12 15:14	133:17,20	212:3,5,6,8	209:25 234:19
76:11,23 77:10	20:24,25 23:1	134:19,24	213:9 214:16	Las 51:10,20
77:16 88:11	23:4 27:1,17	135:4,9 136:9	214:16,16,17	LaSalle 1:21 2:4
90:23 111:18	29:9,24 33:24	136:10,10,18	216:17,20	lasting 44:9
113:13 114:4	35:24 39:11	136:21,21,22	217:19 218:7,8	Latin 30:10
114:14 123:16	40:2,23 41:5,7	136:23,24	218:9,17,21	Lauderdale
123:20	41:9,15,18	137:5 138:8	220:7,13,13,14	48:13
K	42:3 43:18,20	140:5 142:11	220:25 221:9	Laughter
Kaplan 1:20 2:4	46:9,11,13	142:18,24,24	222:2,20	147:24
Karen 236:12	48:5 52:23,24	147:7 149:20	223:16,25,25	law 9:17 17:25
Kearney 2:20	53:4 56:1,5,19	151:15 156:9	225:9 226:21	73:12 78:22
110:15,17	56:23 57:2,12	156:18 159:2	227:25 230:11	90:25 91:2
111:13 114:7	57:23 58:5,6,6	159:11,16,24	230:14,14,16	130:11 134:6,9
114:15 155:25	58:10 59:18	160:1,2 161:2	230:23 232:8	156:2 193:11
236:12	65:12 69:14	161:12 163:22	233:9,10	193:16
Kearney's	71:2,16 72:6	163:24 164:18	234:10 235:6	laws 6:3
111:25 112:19	72:11,12,15,17	164:25 165:2,7	237:18,21	lawyer 22:13
113:14	72:17,18,22	165:13,16,21	238:1	lawyers 5:13
keep 27:2 67:19	73:8,9 74:5,20	165:24 166:2	knowing 30:18	6:12
71:10 141:5	76:2,3,22	166:11,15,17	42:8 43:25	layer 157:23
189:7 194:9	78:11,19 79:16	167:24 168:17	176:1 232:15	158:1 159:2
199:6 227:8	81:13,16,19,21	169:6 170:2,13	knowingly	layout 33:12
Kelby 110:11	81:24 84:17	171:10,11,19	163:17	lead 29:16
148:14	85:24 87:19,22	171:21 173:11	knowledge 17:2	114:23 117:11
Kenneth 1:14,18	88:1,3,4,25	174:6,7,17	63:16 82:18	Leader 122:10
2:17 3:5,12	92:1 96:9,12	175:20 176:1	88:15 238:14	122:13,25
240:5 241:2	98:11,20 99:2	176:14,17	known 7:7 43:5	129:6 131:1
Kenwood	99:18,25 100:7	178:3 179:7,9	163:18 207:10	leading 113:20
234:17	100:15,23	179:10 180:1,8	207:11,20	learn 15:21
kept 206:12	101:13,23	180:13 181:5,7	knows 34:5	learned 38:13
kids 201:3	103:2,4,16,17	182:8 183:11	Kurz 52:5	194:11
205:10 213:23	104:2 105:19	183:13,20,22	K-U-R-Z 52:5	leave 225:11
kind 35:6	105:19,19	187:11,12,18	L	leaves 39:1
133:21 134:22	107:9 108:21	187:21,22,25	La 51:23	leaving 235:14
135:14 190:6	108:24 109:2,6	190:13,14,14	laceration 89:10	LED 231:23
190:24 191:4	109:17,22	192:18 193:13	lack 31:23	ledge 58:8 80:22
194:19 203:13	110:11,13,15	196:1,3,5,13	178:12	106:9,13 107:1
208:6,10 211:5	111:2 114:13	196:16,17,19	lacks 50:9	107:5,12,18,19
	117:15 118:6	196:23 197:15		110:23 113:20

152:15 153:2	light 52:9	171:11 206:13	lot 59:4 100:22	87:7,23 89:19
153:11 154:7,7	lighting 33:5	206:15,16	133:19 135:8	97:22 98:2
154:12 156:3,7	231:23	209:2 222:13	163:14 183:14	99:5 101:12,18
156:15,19	lik 35:11	222:18,23	183:17,21	118:2 155:6,11
159:5 160:6,7	limited 201:14	223:9,15,19	203:9 218:4	188:9,12,14
163:9 166:18	201:14	locations 225:8	237:1	189:1,4 236:11
167:10 181:16	line 47:24 48:13	lock 171:8	low 28:6 43:21	mail 67:15
181:20,22	112:3,18 113:3	long 59:9 138:5	lower 157:22	main 172:4
ledges 80:17,19	113:13,15,25	148:16 170:13	160:2,13,17	maintain 164:11
154:23 156:9	114:18 115:3	207:16 214:23	163:18 181:22	194:11 201:21
156:13 157:12	214:23 241:8	236:17	lowering 164:9	maintained
157:16 158:8	lines 35:8	longer 45:19	lucky 150:25	125:10
158:15 159:7	112:20 231:23	97:5 166:5	lump 163:21	majority 32:14
159:24 160:12	Lino 240:10	171:22 235:15	235:14	making 34:6
160:13,15,17	list 33:2 66:16	look 4:16 5:4	L-E-S-C-H 65:2	207:4
181:22	94:22 95:5,20	27:6 64:19		management
left 52:8 81:24	179:17 220:25	67:1 71:22	M	49:4,11 100:20
leg 163:18	listed 23:7 56:25	72:1 81:5	M 2:12	101:11,13,15
legal 32:9,10	65:15 108:11	103:25 109:19	machine 140:14	131:17
72:7 73:16,19	180:7	111:1 115:22	Maggie 34:3,12	manifest 124:17
73:24 74:3,5	literature 10:21	119:23 122:19	34:18 36:14,18	manner 14:1,14
75:11 76:1,11	31:22 63:4,7	124:21,21	55:16 78:23	14:15 163:19
140:17	68:23 72:3	126:5 127:5,11	83:15 84:14,25	March 7:5 25:18
legs 87:23 89:9	74:15 133:20	127:16,21	85:14,18 86:6	25:20,22 26:3
173:14,17	230:13	128:16,24	86:21,22 87:20	26:4,5,12
length 208:12	litigation 7:16	135:11 136:25	88:5 100:3	34:19 125:7
209:10	7:20 28:8,12	141:22 156:10	101:11 104:24	126:2,13,20
lens 209:12	30:19 32:4,5	165:4 193:14	105:10,18	127:21,23
Leonard 2:21	32:15,19 37:18	233:18	106:3,12 107:4	129:9 146:21
236:12	43:7,8 94:25	looked 57:2	107:12,16	147:2 166:16
Lesch 65:1	229:13	115:17 118:6	108:1,16,22	175:1,9,14
less-than-thor...	little 27:12 59:3	128:23 131:18	109:18 124:14	177:13 183:1
123:24	141:15,23,24	143:9 187:12	150:3 152:12	195:20 219:5
letter 67:23,24	142:7 146:16	187:17,19,24	152:16 153:14	mark 141:17
68:2,14 202:2	163:14 176:18	187:25 190:23	154:2,7 155:21	218:15,20
letters 220:6	180:4 216:19	191:1 214:6	156:3 157:22	230:12
let's 5:4 61:1,2	221:17 235:24	looking 42:4	161:19 181:16	marked 3:2 30:3
61:13 64:19	live 31:1,4,8,10	64:4,12,13	183:14 185:8	54:14 155:13
82:14 119:23	79:13	105:20 110:4	186:8,13	155:25 182:22
138:3 216:17	lived 170:5,12	111:10 120:18	188:12,15,21	234:13 236:6
231:16	lives 144:2	126:7 128:14	188:25 189:3	markedly 223:4
level 11:7 84:18	LLC 30:24	136:9 143:13	212:16,23	married 31:12
99:15 157:22	LLP 1:21 2:4	148:23 156:21	213:3,11,18	massive 82:6
158:23 159:1,5	lo 224:11	160:10 165:6	221:12,22,25	match 205:16
165:16	local 116:1	168:11,18	222:17 223:18	material 12:1
levels 156:12	located 5:19	199:9 236:23	223:24 231:19	57:7 96:13
159:6,24 160:1	144:14 224:12	looks 164:1,3	231:24	109:2 142:24
liability 33:9,18	location 141:16	194:19 234:25	Maggie's 36:24	162:17
life 183:15 185:1	157:11,15	lost 183:15	55:15 80:7,12	materials 56:24

57:1,8 60:22	173:11 199:20	151:4	148:2,12,14	10:18 188:21
61:22 63:10	200:19 222:24	member 15:14	149:7,18,23	188:25 193:23
64:23 65:7,14	223:1 224:21	16:3	165:2 178:15	194:3 201:11
65:18 66:12,16	237:17	members 143:15	Mike 110:10	201:22 213:21
66:23 67:14	meant 75:15	memorandum	mile 223:4	214:14
68:7,10 69:7	120:9 147:14	80:6	miles 223:4,4	monitored
93:16 94:3,6,9	meas 221:16	memories 24:15	mill 203:15,17	191:14 200:17
94:12,22 95:1	measure 199:5	memory 21:19	mind 136:16	211:21
95:11,15,22	208:5 210:3	21:21,23 22:1	185:25	monitoring 11:1
96:11 97:7	214:15 221:18	23:17 24:1	mine 43:10	11:14,20,23
108:11 109:7	233:11 237:4	150:22	minimal 128:1	12:9,18 31:21
180:21	measured	mention 36:8	218:23	71:9,15 72:22
math 27:14	221:19,21,21	90:14 119:9	minimum	72:23,25
mathematics	222:4	130:20 135:11	217:10,13	164:21 190:3
38:19	measurement	203:16	218:23	199:20 200:25
matter 15:19	208:1,4 209:1	mentioned 36:7	Minneapolis	201:1 213:19
18:20 37:5,13	222:9	89:7 92:7	1:22 2:5	214:10
44:18 55:22	measurements	118:1 119:8,10	182:20 234:17	month 126:7
61:7 62:4	207:5,6,10,11	130:7,16	Minnesota 1:22	127:18 166:16
76:11 137:7	207:13,17,20	136:19	2:5 144:4,10	months 59:12
189:17	209:13,16	mentioning	205:9 234:18	125:6,13 126:1
matters 10:16	mechanics 84:4	116:21 120:16	240:10	127:11 128:17
15:1,8 16:9	91:6	181:22	minors 192:1	146:13 175:9
53:14 132:4	mechanism	mere 201:4	minus 208:1,2	177:13
maturation	36:21 62:5,7	messages 232:8	minute 4:17	Moore 2:7 4:7
10:12 31:22	62:12 85:24,25	messaging	69:24	22:16 25:3
211:19 212:6,7	87:2,21 88:7	232:10,14	mischaracteri...	26:1 53:15
mature 212:11	mechanisms	met 100:14	157:4 175:17	58:20 62:9
maturity 211:24	86:9 87:10,14	139:11,12,12	204:22	74:4 97:1
McCord 238:2	88:10	148:4,5	mislead 114:14	131:15 137:18
mean 8:25 15:22	medical 3:25	method 40:22	misleading	139:25 147:9
21:17 32:7	9:11 33:9	43:6 45:1	114:17	147:16,18
37:6 39:15	90:19	207:23 208:3	misread 16:14	148:10 149:25
57:11,12 72:11	meet 149:18,23	210:22	missing 171:10	239:8
72:17,18 73:22	217:13	methodology	171:12	Moore's 26:8,11
74:6 92:5	Melanie 139:19	219:10,12	misstep 33:8	65:18 114:16
109:5 117:8,14	Melendez 66:6	methods 40:3,9	mitigate 98:21	morning 138:7
133:5 137:9	69:8 83:11,11	40:17 44:23	131:21	Morrongiello
185:22 199:16	149:14 150:24	metric 207:9	mitigating 98:5	11:25
199:19 200:22	183:25 186:12	Michael 236:10	98:6	Morrow 51:22
209:22 211:2	186:22 202:8	middle 161:1	mixed 220:6	mother 36:24
meaning 74:23	205:12,17,18	204:7	model 209:9	55:15 85:12
75:6,20	205:22,25	Midwest 127:9	modified 45:18	188:9,12,15
means 10:14	206:9,18 208:7	127:14,18	46:9,10 83:2	210:25 211:2
40:2 72:7,13	209:3 210:11	143:23,24,25	mom 214:2,2	212:22
72:19 74:21,22	210:16 211:12	144:5 145:4,8	moment 5:12	mothers 83:21
75:1 100:6	211:15,17	166:4	18:6 55:23	108:19
101:14 118:4	213:2,5	Mieras 110:11	62:20 224:9	motion 50:15
153:25 166:2	Melendez's	139:12,19	monitor 10:15	51:8

motions 52:23	12:18	116:2 117:25	237:5,7,15	114:7 156:5
motor 212:8	need 10:14 14:6	118:10 119:8	noticeability	197:3
214:3	15:7,21 24:3	119:11 120:14	237:4	object 74:4
mounds 142:17	75:14 99:2,10	120:19,24	noticeable	114:16 131:15
mountains	99:25 104:10	121:2,6,12,12	220:19,19	207:11,14
145:1	112:3 114:19	121:15,18	noticed 138:19	objects 207:12
move 35:3	136:17 137:10	122:8 124:3,4	230:3 237:8	obligation 13:24
113:23 132:2	163:11 168:9	126:18 129:24	notify 52:22	obligations 7:19
159:3	170:9 179:4,13	nice 109:5 189:8	notion 85:18	obscure 58:7
movement 34:11	179:15 197:22	night 69:19,21	notwithstandi...	158:8,15
moving 176:20	209:20 210:24	85:16 185:5	79:12 169:12	160:13
206:12	211:21 214:9	nighttime 235:4	226:7,14	obscured 80:22
mud 161:13	223:11,13,16	Nikon 209:7	Nowadays	154:6,12,19
multiple 117:10	224:4,22 225:1	nine 155:23	126:23	158:19 160:3
117:10 135:25	225:10,16,17	Ninety 27:13	nuclear 8:16	160:17 181:16
156:9,12 160:1	226:25 235:16	noise 154:1	number 5:2,3,5	181:20
194:19 232:24	235:22	noncompliance	5:9 17:3,7	obscures 160:11
M.Z 1:6	needed 60:14,14	229:23	27:11 28:9	obscuring
<hr/>	108:7,16,21,24	nonobvious	29:21 33:2	156:15
N	150:17 169:18	174:5	49:14 50:18	observation
N 3:1 241:1	171:11 224:9	nonresponsive	54:18,23 55:4	73:3 183:18
name 3:11 48:4	224:10 227:3,7	35:4	55:9,15 57:13	185:8 186:7,13
71:9 139:15	227:20	non-ANSI-co...	65:21 71:6	191:9 192:19
151:8	needs 164:18	229:15,19	73:5 77:24	201:3,14 203:5
narrative 67:17	172:14,20,23	nooks 195:16	78:1 80:18	203:9 232:22
National 238:10	174:11 182:5	normal 50:12	91:8,9 96:20	observational
natural 8:18	217:4,6 222:13	North 144:4,10	96:22 104:2	198:12 201:25
182:7,9,11	223:10 227:10	Notary 240:16	119:18 124:21	observations
233:1,7	235:19	note 59:23 60:3	125:5 126:11	192:11
nature 42:15	negligent 51:15	60:4 126:16	134:24 136:5	observe 197:10
45:21 136:11	Neither 161:21	141:14 148:19	139:8 141:21	observed 81:5
227:10	Nemire 1:14,19	158:3	144:25 157:19	141:24 191:12
NB 141:14	2:14,16,17,18	notebook 23:3,4	158:7 159:9	191:20 192:3
near 122:6,24	3:2,5,12 4:2	noted 182:6	162:10,22	198:20 201:12
128:12 129:8	8:3 30:4 35:6	notes 140:7,10	201:15 202:1	214:19
135:20 153:1,3	47:2 54:14	140:18,19,20	205:10,22,25	obstacle 86:16
212:23 213:3	132:18 139:15	140:21,22,23	206:10,18,20	obstacles 235:22
225:9	209:21 234:13	140:25 141:2,3	220:7 230:17	obstruct 160:2
near-miss 122:5	236:6 240:5	141:12,13	232:9,15 236:1	obstructed
necessarily	241:2	148:19,22,23	numbers 96:5	160:3
21:17 66:24	Nevada 7:6	149:1 155:4	96:18 125:9	obtained 82:19
124:20 133:5	never 47:20	157:15,24	numerous 22:20	obtaining
164:17 224:15	76:17 79:14	209:19,24	79:13 84:3	236:25
225:9	144:18 161:6	240:8	<hr/>	obvious 54:20
necessary 15:18	193:14 198:11	notice 1:19	O	54:25 57:15
15:25 16:23	204:23	41:23 42:1	o 3:1 207:10	74:10 75:2,10
17:16 169:11	new 50:5	171:21,22,23	oath 7:6 47:18	75:15,18,19
228:8 233:3	newer 218:3	184:9 218:13	110:25 111:14	76:1,5,7 78:12
necessity 10:18	newspaper	218:18 235:15	112:19 113:14	100:4 101:5

Page 261

167:4,18,19	oh 7:10 36:7	140:16 141:8	54:25 57:15	41:5,14 42:5
168:25 169:13	49:22 52:10	143:22 144:3,9	74:10 75:2,10	42:10,11,13,14
173:18,23	67:25 68:6	144:23 145:15	75:15,18,19,25	42:17,20 43:8
233:22 234:1	78:1 89:15	146:4 147:8	76:4,6 167:4	43:10,11,14,16
obviously 119:9	112:7 119:20	148:5,7 151:13	167:18,19	43:17,18,21
234:19	200:9 221:20	152:13,18	168:25 169:13	44:3,12,16
occasions	224:16	153:6 155:24	169:23 173:10	45:16 46:9
144:25 168:23	okay 13:4 14:12	158:12,14	173:18 197:2	49:17 53:19
occur 46:24,25	14:24 22:19	161:9 162:7	204:17 233:22	54:17 55:19,24
47:1 71:16	23:10 26:3,6	163:1 164:2	233:25	55:25 56:2,3,6
73:23 125:3	26:10,15 27:22	165:24 166:6,9	operate 5:16	56:11 57:6
132:18,19	28:1 30:12	167:6,22 168:1	operates 6:2	58:8 59:16
175:21	32:14 33:1,4	168:4,7 173:12	9:14	60:11,12,19,23
occurred 18:15	34:9,14 37:2	174:13 175:7	opine 49:10	61:3,5,14,16
21:20 35:2	39:9 40:21	177:11,16	opined 169:11	61:24,25 62:2
41:10 57:18	43:1 53:6,12	181:19 183:2	170:20	62:11,17 63:25
58:4,10 64:5	54:23 55:4,19	183:11 192:1,7	opining 101:16	70:2,5 74:8
96:24 103:16	58:19,23 59:9	193:21 194:14	opinion 16:12	76:22 77:12
105:7 107:25	59:12,14,20	196:13 204:5	36:18 38:21	82:21 83:1,3,6
117:11 122:20	60:7,11 61:10	204:18 206:11	41:7,13 52:19	83:22,23,24
124:9,13	61:21 64:3	206:24 208:6	54:4,10,23	92:12 94:17,18
126:18,19	65:6,16 66:1,7	209:10 211:1	56:24 57:9,13	94:21,23 95:11
150:15 152:11	68:13,19 69:2	212:4 213:15	57:20 61:9,20	96:7,9,14,16
occurrence	69:5,10,15,22	214:12 215:2	71:7 73:15	97:6,9,10,20
125:2	70:3,4,14 72:4	216:14 217:8	79:7 94:14	102:10,20,22
occurring 129:8	74:9 77:19	221:24 222:8	95:3,4 97:25	114:20,21,21
148:17	78:4 79:5,12	223:8,12 227:5	100:16 101:9	114:25 123:9
occurs 46:18	81:8 82:9 84:2	230:24 234:11	101:24 131:3	123:13 125:4
106:22 125:22	84:10 85:18	235:9,24	131:12,12	188:8 189:25
212:6 236:17	86:19,25 87:8	238:21	145:9 157:2,6	opportunity
Oct 2:17	88:10,14,19	old 48:12 192:16	172:2 176:21	22:5,8,19
October 6:21	89:7,18 90:13	192:21 211:22	177:12,16	23:10 35:13
odd 142:13	91:5 93:10,23	212:1,13	178:8,11 187:2	59:6 83:10
offer 97:20	94:5,8,16	213:21,22	188:11,14	opposed 14:18
101:9	95:12,15 96:2	214:7	191:5,8 192:8	50:12 78:17
offered 20:8	99:2,7,9 102:1	older 214:5,22	201:20 202:5	86:17 111:20
offering 61:7,18	105:5,14 106:2	218:3 226:9	205:11 211:18	126:7 221:1
62:3,18 97:10	106:15 107:4	olds 214:3,5	213:16 214:25	optical 208:22
offers 91:19	107:10 108:4	omitted 23:22	215:1 222:15	option 181:14
office 26:8,11	113:23 114:1	226:19	223:17 234:22	orange 234:1,5
31:2,3 65:19	116:25 121:7	once 73:10	236:24	234:20,22
144:13 148:10	121:25 122:12	113:24 124:25	opinions 10:2	235:2
officer 52:10	122:17 124:16	124:25 206:15	12:17 13:25	order 16:23
65:20 67:7,11	125:21 126:10	ones 18:12 24:15	18:4,8,18	91:19 127:4
67:16 89:20	127:20 128:8	114:5	23:19,20,22	172:17,18
156:2,10,16,18	129:4,13 132:6	one's 168:21	25:5,7,12,17	173:1 227:12
158:21	132:16 133:1,3	171:23 231:5	29:5,9,14	organized 6:2
official 139:22	133:7 137:25	one-step 200:19	35:19,24 36:3	orientation
off-duty 52:10	138:20 139:16	open 39:2 54:19	36:22 37:5	224:2

oriented 223:23	pair 194:17	152:2,4,4,7	party 29:6,15	179:9,22,23
origin 48:18	paired 103:20	165:25 175:1	51:19 143:16	181:2,11 184:9
ought 105:25	panel 12:24	175:10,13	143:18 145:9	187:11 196:8
216:6	13:10,17,21	176:6 177:12	183:13	196:10 201:15
outcome 57:24	16:3	177:20 178:16	pass 91:19	218:13,19
58:1	paper 12:24	181:25,25	187:11,12	220:22 224:5
outcrop 151:4	173:21	182:1,9 183:1	patches 142:16	224:19,23
outcropping	papers 63:14	183:7,9 186:24	161:22 175:24	225:5,15
151:4,6,17,21	84:3 173:22	191:10,23	176:5	227:23 235:15
158:15,18	par 122:2	195:9 196:14	path 186:13,17	235:17 236:21
outdoor 214:21	para 49:16	197:9 201:12	pathology 90:17	237:6,9,10,12
outline 32:20,24	Paragra 113:2	204:21 218:24	90:20,22	237:14,16,23
56:2,16 135:3	paragraph	223:5 232:11	Patricia 2:3	238:3 239:4
outlined 61:24	14:10 61:4	232:14,20	pay 41:18	perambulation
83:23,24	77:24 82:14	236:15,18	171:13 218:19	50:12
outside 62:15	84:5,8,8 91:11	238:7,10,15,23	paying 41:21	perceive 8:7
229:13	92:11 111:24	parking 183:14	163:21	perceived
overall 43:20	115:24 116:9	183:17,21	pedestrian 33:6	114:10,10
oversight 139:21	119:8 122:3	203:9	222:1	161:20 163:8
140:2	162:20	Parkway 234:17	peer-review	214:4
oversights 140:4	paragraphs	part 12:9,19	6:18	percent 5:13,14
o'clock 1:23	49:20 50:1	13:10,17,21	peer-reviewed	6:13 38:6,7,12
P	77:20	14:24 17:19	6:16	38:25 41:16,18
P 3:1 241:1	parent 188:19	26:18 30:19	penalty 111:14	41:19,20,24
pad 140:17	190:7,11	39:7,22 57:8	people 8:13,17	42:1 116:16,21
page 2:14,16	202:17,19	98:3 102:8,18	12:20 23:16,25	116:24 118:12
35:8 54:15,15	parental 12:18	116:24 134:5	37:3,9,20,22	126:19 174:18
69:23,25 74:9	31:23 201:10	139:18 163:25	37:25 38:4,13	174:18 211:3,7
77:19,24 82:14	parentheses	173:13,19	38:15 41:17,20	230:10,15,16
82:14 84:2	75:18	187:20 188:23	41:24 44:9	237:6,9,10,12
91:10 92:11	parents 10:3	190:3 193:18	58:2,6,12	percentage 6:11
93:14,15 95:17	191:25 196:6	201:16 202:4	79:13,21 84:20	118:22
95:24 96:3	201:11 214:9	partially 159:21	95:3,5 104:18	percentile
111:17,25	park 2:19 8:20	partic 78:10	107:24 108:8	210:21
112:6,18 113:3	25:25 55:10	participants	119:21 125:9	perception 7:1
113:13,15,25	81:6 98:25	50:14,15	127:6,14	33:7 233:20
114:18 115:13	99:5 100:3,17	particular 20:7	135:12 138:20	perceptual
115:22 139:16	101:22 106:20	44:2 49:3	139:2,3,6,6,9	10:13
141:11 162:6	110:20 116:1	52:19 74:7,23	148:2,9,10	Perceptions
162:10,11,13	125:6,22 126:7	103:14,17	161:12,12,12	65:3
162:20 200:14	126:12 127:22	132:10 137:9	162:25 167:12	perception-res...
202:2 205:14	128:19,24,25	160:6 162:8	168:24 169:7	33:7
241:8	129:2,9 132:19	164:20 173:25	170:4,12,17	perform 132:7
pages 1:15 56:1	137:21 138:21	177:22,25	173:14,24	134:25
94:9,13 112:5	138:25 139:3,7	184:10 222:21	174:1,13,14,14	performance/i...
240:7 241:4	139:10 146:5	223:22	174:17,18,22	33:5
paid 5:14 6:13	146:10,19,25	parts 114:4	175:1,8,14	performed 99:4
28:2 39:17	147:19 148:1,8	126:20 144:24	176:15,22	101:4,5,21
	149:18,23	195:17 223:6	177:14 179:2,5	122:18 128:23

Page 263

period 77:25 106:16 107:13 107:20 117:3 126:4 180:12	photogramme... 210:24 photogramme... 206:25 207:1	50:13 Ph.D 1:14,19 3:5 3:13,16,19 240:5 241:2	places 73:6 170:25 175:24 176:6 224:5	222:16 225:15
perjury 111:14	photograph 155:14,24 156:6,21	pick 48:20	placing 222:21 232:7	pointed 150:14
permission 191:22	158:17 159:3,4 160:11 191:22	picked 19:24 79:5	plain 171:18	poking 160:5
permits 193:17	205:13,13 206:15,17	pictorial 227:4	plaintiff 1:7 2:2 7:7 32:4,12 48:2	police 19:11 20:1 52:10 86:6 102:17,18 102:21 150:25 212:24 213:13
person 7:19 21:25 71:15 73:2 118:7,9 161:6,24 162:16 164:21 172:11 173:6 179:6 189:4 202:15 203:25 203:25 210:9 222:13 223:10	photographed 191:19	pictorials 217:21 220:5 226:25	plaintiffs 28:14 plaintiff's 51:14 52:9	policies 97:8,18 policy 9:14 population 210:21 211:4,8
personal 1:5 16:7 31:5,13 31:15 82:17	photographs 65:21 67:17 89:22,25 90:9 102:19 142:1,2 142:15 145:20 146:18 150:17 150:20,24,25 151:5 155:10 165:3 175:23 176:7 192:1 196:22 197:1 199:10 205:23 206:1,22 207:5 207:7,10	piece 19:6 20:7 21:18 22:9,12 22:16 170:19 220:22	plane 207:12 planning 57:3 plant 8:16 plaque 203:17 platform 151:3 151:23,24	Portable 7:1 portions 109:9 109:10 pose 142:4 posed 36:8 177:20 179:2
personally 149:5	PhotoModeler 207:15,18	pieces 18:13 20:16,21 21:11 21:12,15,16 24:5,6 68:23 82:2 217:23 219:2	play 18:1 119:17 136:5,18 238:4	poses 233:6
personnel 134:10 179:20	photos 67:7,11 89:14,15,17,19 141:14,23 205:16 208:25 209:2 236:15	pile 142:13,20 143:9,13,17,20 145:10 161:25 175:18,20,21 176:8,9,9,15 176:17 203:19 204:16 205:6 234:19 235:1 235:10,19	playing 116:11 116:19 178:18 194:18	position 114:9 115:2 213:18 225:3
perspective 123:20	photograph 191:19	piled 142:12 161:20 162:17 204:14	pleasant 232:12 please 3:11 53:16 64:20,25 69:23,25 91:8 93:3 111:24 112:18 113:12 114:18 115:9 115:15 140:22 141:10 170:1 188:5 236:2	positioned 199:14,24 200:3 225:4
persuade 82:5	phrase 15:11 72:12 74:20 116:20,20 158:7	piles 143:10 144:16,21,22 145:25 146:2 174:15 176:10 195:11,12	playing 116:11 116:19 178:18 194:18	possibilities 35:1 86:1 87:1 98:20
persuading 14:18	phrased 119:7	piling 204:7,9	pleasant 232:12 please 3:11 53:16 64:20,25 69:23,25 91:8 93:3 111:24 112:18 113:12 114:18 115:9 115:15 140:22 141:10 170:1 188:5 236:2	possibility 22:2 34:8 36:7 39:2 42:14 44:14 187:6,8
persuasive 14:15 79:6	phrasing 176:4	Pinata 51:23	plethora 108:12	possible 35:1,9 35:11 38:18 86:3,22 88:12 98:5 171:9 186:3 198:3 216:17,25
persuasively 12:21,24	physical 100:24 214:17,19	pitching 48:23	plus 27:20 208:1 208:2	possibly 92:5
pertaining 9:21	physics 46:16	pla 151:23	point 21:2,2 25:1,8,11 29:2 38:12,15 48:22 58:11 59:16 75:16 76:17 80:14 86:16 97:1 101:11 114:11 135:24 158:17 168:22 178:15 179:5 201:5 203:5 211:9,11	Postal 67:18
pertains 84:12	physiological	place 106:19 223:13 224:5 225:12 232:12 238:22 240:5	point 21:2,2 25:1,8,11 29:2 38:12,15 48:22 58:11 59:16 75:16 76:17 80:14 86:16 97:1 101:11 114:11 135:24 158:17 168:22 178:15 179:5 201:5 203:5 211:9,11	potential 29:22 70:10,18 88:10 100:25 164:22
pertinent 84:21		placed 7:6 103:24 170:19 222:12 223:9		power 8:16
pg 2:20				practice 170:5
pgs 2:17,19,21				practices 97:3,8
Philip 2:3				precautions 161:15
Phillips 2:9				precepts 225:22
phone 25:15 148:20,25 208:8				
photo 2:20,21 191:17 206:8 206:20 209:11 221:21				
photogram 207:9				

precipitated 135:21	123:19	problem 16:25 49:12 136:4 223:22	102:10,19 122:21 132:9 143:18 169:4 169:11 170:10 171:8 177:1 179:15 216:11 220:25 225:4 228:4 233:25	psychologist 11:18 82:19 189:20
precipitating 104:18	presents 70:6 136:2	proceed 161:11	provided 30:4 30:18,19 56:24 57:21 58:19,23 60:23 61:23 65:18 67:17 82:23 86:2 94:22 95:16,22 96:3,9,15 102:12 114:25 115:18 116:1 120:19 121:2 134:3 143:16 146:20 174:12 180:3,22 220:21 228:6	psychology 3:16 12:3 45:24 46:18 75:22 84:3 91:6,15 92:1,3,6,7,8,9 93:4,8 94:19 198:6
preclude 99:16	president 5:22	proceedings 13:7,16,23 17:17	public 233:19 235:21 240:16	publication 198:13
precluded 51:13 51:18	press 6:20	process 4:18 7:16 27:8 30:19 96:10 117:16	publications 6:16	public-relations 233:11
predict 167:8,9	presumes 224:19	processing 33:5 94:20	published 6:19 6:21	pulling 69:3
preferably 192:15	presupposes 144:18	product 33:9 169:3	pure 187:8,20 238:5	purpose 6:7 8:7 8:21 15:10 17:13,19 61:14
prepare 22:5	pretty 70:13 139:9 179:3	production 96:21	provider 214:21 214:22	purposes 172:4
prepared 30:16 49:1 88:11 99:2 156:5 187:15	prevent 104:6 232:1	products 33:10 33:18	provides 32:20 163:12 180:1 219:10	pursuant 1:19
preparing 27:16 69:4	prevented 18:16 58:1 146:24 231:17,22 232:6	profession 74:24	providing 39:23 57:6 136:11 177:9 211:6 218:17	pushed 88:14,17
presence 98:12 117:2,21 118:17,20 119:3 120:5,10 120:25 121:4 121:20 122:25 123:25 124:8 129:19 130:24 131:4,10 172:5 177:12 232:17 234:6	previously 217:3 pre-2002 217:16 217:17,24 218:5,10,22 219:1 226:11	professional 31:25 91:18,20 91:22,23 132:5	province 76:10	put 60:8 62:13 68:22 103:10 127:13 141:13 146:7 151:24 164:13 168:5 169:9 206:16 210:20 212:25 232:10 234:22 235:23 238:1
primary 124:23 136:20	principle 220:23 220:24 227:9	program 207:15	proximate 152:9 153:1 200:21 224:10,17,18	putting 30:3 97:4 232:14
present 2:11 8:22 12:21 13:18,25 17:15 17:21 55:21 83:14 86:13,20 123:22 127:7 129:10 138:25 152:1 154:2 166:5 183:1 197:5 228:20	principles 15:15 38:24 172:15 219:25 220:12 220:13 221:7 221:10 225:23 226:1	progression 212:7	proximity 214:15	puzzled 204:3 204:25
presentation 12:25 13:10,21 16:2	prior 42:6 43:14 43:16 58:12 80:7 84:14,16 87:7 99:5 101:11,12,18 217:5	projecting 159:7	prudent 168:23 203:25 232:18 233:25	P.C 2:8
presentations 12:20	probability 39:3 227:16 228:3	pronounces 48:5	psychobiology 3:23 10:20 11:10	p.m 115:11 188:6 239:11
presented 13:17 54:19 99:17 100:9,17 152:20,23 197:8	probably 25:14 127:19 134:24 144:6 183:10 205:8,18 235:3 238:3	proofread 94:2	psychological 44:9 93:6 212:8	P.O 2:8
presenting		proper 133:13 133:17		quali 182:6
		property 128:19		
		proposed 47:17 47:19		
		proposition 28:19 124:16 178:22 222:11		
		pros 179:17		
		prospective 219:8		
		Protect 63:16		
		protocol 219:8		
		proven 42:6		
		provide 6:8 9:10 31:7 55:25 56:3 84:23 98:24 101:24		

qualified 47:3,6 49:10 240:3	110:22 116:9 116:13 117:1,4	112:3,5,18,25 113:1,12,25	92:13 93:5 134:3 161:24	232:13 234:24
quantifiable 38:20	157:15,17 194:7 236:14	114:6,13,18 117:5 139:24	162:15 186:5 186:10,20	recommendati... 132:10
quantify 41:12 42:9 43:13	R	141:18 156:14 173:21 185:4	187:2 203:24	recommended 229:14
quantifying 43:6	R 3:1 218:2 240:1 241:1	202:24 203:1 204:5 205:20	reasoning 40:19 reasons 17:3	recommends 221:2 238:2
ques 111:7 179:10	rail 52:9 railing 169:19	218:13 230:3 237:9 238:9	25:4 50:18 179:18 237:2	record 3:11 13:5 35:7 53:16
question 5:11 8:3,6 18:7 19:5	169:22,22 170:11,12,14	239:8 241:3 readable 220:20	237:15 rebut 25:5	67:19 113:13 115:9 147:10
20:22 23:14 29:19 35:5	170:21 171:10 171:12,20	readily 66:13 75:17 167:7	rebuttal 179:16 rebutting 62:10	188:5 209:16 228:12 234:12
36:2,15 37:7 39:5 43:3	railings 170:6 182:18	214:19 229:10 233:3 234:9	178:11 recall 7:14 36:6	236:5 239:10 records 27:2
49:24 54:11 57:5 60:24	rain 138:14 Rainstorm	reading 10:20 15:15 84:1	45:7 51:16 65:17 78:20	134:7 red 229:9,10
61:14 66:18 93:22 102:10	138:11 raising 31:17	99:1 110:2 118:11 119:14	79:4,24 80:3,9 80:14 85:15	redundant 226:18 227:21
113:12 125:14 138:4 141:14	ramp 51:24 ran 84:25 85:7,8	162:5 179:7 180:19,21	99:1 102:7 107:3 130:7,21	refer 79:22 80:1 80:7,12 201:2
141:17 142:4,5 142:5,9 145:13	85:14 235:18 range 87:1	200:13,14 203:12,17	169:14,15 182:19 184:18	reference 57:21 57:22 58:25
146:8 147:6 162:9,24 165:7	212:9 rarely 46:24	readings 12:9,12 12:16	184:21 185:16 204:19	59:25 77:19 95:2,6
167:22 176:13 177:2,3,5,21	47:1 144:15 230:10	ready 23:11 real 41:13	receive 10:23 67:14	referenced 45:7 63:11 66:2,24
179:2,9,12,12 201:16 202:1	rate 42:9 43:6 43:13,22	233:19 reality 189:8,12	received 3:19 11:10 22:17	68:23 69:6 75:16
229:24 234:4 235:6 236:20	207:25 ravine 81:20	realize 59:14 realized 148:15	26:12 67:11,19 69:12 94:6	Referential 63:19
questions 59:5 65:9 91:25	reach 29:5,14 37:13 191:4	150:1 really 99:25	Recess 53:17 115:10 188:6	referred 78:23 79:14,20 98:24
150:8 157:19 166:13 176:14	199:22 200:19 reached 94:18	119:22 120:3,9 121:8 151:12	recitation 30:7 30:13 95:10	134:6 137:14 referring 142:1
177:20 192:15 215:5 220:14	reaches 165:16 reaching 18:18	152:8 160:16 171:5 198:5	recognize 75:11 75:25 214:4	147:11 158:18 refers 51:1
239:2,6 queueing 153:25	86:7 88:5,6 102:22 105:21	216:18 235:16 rearing 10:6	recognized 111:9 236:16	reflect 99:14 209:1
queues 163:4 quick 65:9	123:9,13,16 read 11:13,22	reason 42:1 68:17,19 147:5	recognizing 112:15	reflective 235:5 reflex 206:6
quicker 207:16 quite 15:14	12:7 13:2 14:9 16:15 18:24	151:21 168:8 184:16,18	recollection 29:8 68:16 110:9	209:5 refresh 150:22
21:20 199:4 218:23	35:6,7 41:23 54:21 55:2,7	204:13,20 235:10	111:6 112:12 130:18 179:1	refused 52:12 149:10
quote 13:24 14:1 14:3,19 16:4,6	55:13,17,20 79:17 83:10	reasonable 34:16 35:19	184:23 185:1 213:6	refute 25:5 regard 16:6,23
16:7,11 84:2	85:16 106:11	36:12 82:22	recommend 132:21 229:18	regarding 8:22 10:18 17:14,20

18:3 31:20 50:11 207:25 regardless 237:19 regularity 37:17 regularly 75:6 rejected 47:20 relate 11:14 related 10:17 11:23 50:15 74:15 90:19 97:16 103:8 120:17 121:2 121:13,19,23 129:1,24 130:10,12 137:9 relates 51:14 94:2 relating 40:2,8 Relationship 65:4 relative 63:1 98:25 100:2 155:3 232:20 rele 121:1 relevance 128:1 relevant 8:10 9:22 12:5,17 15:25 31:17 33:21 74:7 96:14 97:6 99:19 100:18 101:8,20 102:4 103:13 126:4 128:16 reliable 92:18 207:4 relied 123:8,12 rely 123:16 relying 44:25 63:5 remember 14:3 24:22,25 48:15 48:16 49:15 87:19 93:24 104:8 118:11 118:13 185:23 185:24 187:3	187:13 203:14 208:8 236:1 remembered 150:15 remembers 185:7 remotely 227:12 removal 151:21 removed 151:5 151:18 169:20 169:22 170:14 170:22 rendered 42:6 44:3 54:4 59:9 rendering 53:19 125:4 157:2 repeatedly 130:15 repeating 119:20 rephrase 115:21 220:9 report 2:18 9:6 10:2,11 11:8 11:24 18:3 23:7 24:20,22 24:23 25:3 28:18,21,23 29:5 35:13,18 36:4,9,11,17 36:21,22 50:9 54:12 55:21 56:17,25 57:8 57:17,18,23 58:16 59:9,17 60:23 61:5,17 61:24 62:1,8 62:10,14 63:6 63:9,11,21 65:17,19,25 66:16,24 67:17 68:3,8,11 69:7 70:12 71:8,25 73:6,11,21 74:9,12 75:15 76:24 77:2,3 78:5,20 81:23 82:13,15,16,21 83:3,9,18,25	84:24 89:11,23 90:3,6,10,14 93:15,20,23 94:14,24 95:19 95:24 97:6 98:10 102:1,17 108:9,11,17,23 115:14 119:13 122:8 126:16 129:15,22 139:16,24 140:4 148:15 156:8 161:18 162:6 178:22 180:3 182:7 194:16 200:8 200:14 201:2 205:14 213:13 215:13 217:17 218:3 226:4,17 230:1 reported 103:18 104:23 105:6 105:10 106:9 106:12,25 107:4 129:7 131:1 153:17 153:22 reporter 35:7 53:16 115:9 188:5 239:9 240:3 reporting 130:2 reports 28:24 76:17 79:25 94:25 102:22 105:2,4,18 106:2 122:4,20 122:21,24 124:3,4 130:12 135:11 repose 35:5 represent 236:13 Representative 1:5 represented 183:2 198:11 representing	29:15 reproduce 206:8 206:19 reproduced 206:14 request 149:22 requested 108:7 required 108:16 233:4 requirements 217:7 requires 52:22 rescue 104:1,10 104:15 116:18 117:3,22 118:19,21 119:5 120:7,11 121:5,8,9,21 123:2 124:1 130:17,20 rescued 118:9 rescuers 116:12 116:17,22,23 116:23 rescues 115:18 116:1 research 6:15 10:12 29:25 31:21,22 38:22 38:23 40:20 41:8,15,15,17 42:12 43:11 44:25 45:3 46:2,8,10 60:25 75:9 94:9,12,20 95:4 139:11,14 174:16 176:15 186:4 187:11 212:5 216:13 218:18 220:2,8 220:17,18,20 225:23,25 226:18 227:14 229:12 230:13 237:13 reserve 35:23 respect 17:16,22 17:25 19:3	201:17 202:5 205:12 226:2 238:10 respectful 76:9 respond 74:19 114:19 127:6 responded 134:10 responder 79:25 responders 78:23 114:22 response 25:6 137:15 responsible 117:16 124:24 188:23 189:4 189:11 190:7 190:18 197:20 213:21 rest 111:1 114:2 116:12,21 152:6 restaurant 51:25 result 84:1 117:10 220:22 resulted 107:24 116:10 resulting 31:23 117:17 results 38:23,24 39:2 52:24 98:13 resume 30:7 retained 8:5 36:23,24 48:1 51:9,22 52:5 retainer 26:17 26:19 retention 26:13 26:18 52:21 return 112:3 review 22:8,20 22:24 23:8 35:13,16 69:20 89:11,14 93:19 93:21 96:13,18 108:7 111:16 134:6 155:4
---	--	--	---	---

Page 267

reviewed 18:10 21:5 23:6 66:8 66:9 69:10,15 89:17,19,22,25 90:6 93:16 94:3,7,8,13 95:1,16,23,25 96:2,15 97:7 108:10 113:21	70:15,20 71:2 71:5 76:14 77:6,10,17,20 86:24 87:3,5 91:5 93:3,11 99:23 101:25 106:5,8 116:8 116:16 117:7 120:12 122:6 124:7 126:24 129:11,12,18 130:19 131:22 133:11 137:1 137:13,18,19 140:23 141:25 142:7 143:4 149:8 151:25 154:5 157:10 159:17 160:22 162:12 165:13 166:24 167:14 170:23 171:1 172:20 173:4,9 173:16 178:2 178:11 179:11 183:7 185:5,9 185:12,20 186:10 187:1,5 187:19,23 188:2 191:25 192:14 193:24 194:13 195:10 195:14 198:22 200:15 212:2 212:12,17 220:9 223:10 223:14 229:1 239:1	102:6 river 2:19 8:18 25:25 34:13 36:14 54:19,24 55:1 57:14,16 78:7 81:10,25 84:14,15 85:1 85:3,5,7,19,22 86:8,23 87:3,9 87:11 88:1,2 104:2 105:8,11 106:10,13,16 107:1,5,14,19 113:20 120:20 120:21 126:20 138:23 141:17 142:6,12 150:23 152:20 152:22 153:6,9 153:14,16,21 154:2 155:7,8 159:12,15 160:19 161:2 161:25 162:17 164:5,6,25 165:8 166:22 167:8 175:9 176:3,22 177:14 180:10 182:8,12 191:18 194:10 194:12 195:2,8 195:12,17 197:18 198:18 199:14,22,25 200:4,22,24 203:19 205:2,3 205:4,5,5,19 206:5 222:22 222:23,25 223:2,3,4,7 224:7 225:2,3 225:11 233:1 237:18,24 238:4	road 231:23,24 234:19 roadway 235:22 roadways 235:13 Robins 1:20 2:4 rock 34:23 120:22 151:17 151:21 154:7 154:23 156:17 157:12,16 158:15,18,23 159:1,2,5,24 160:6,6,7,16 160:17,25 163:9 164:1,3 167:16,20,20 206:21 rocks 36:8 109:9 157:21,23,23 158:2 159:7,21 160:5,24 167:1 209:25 226:22 227:6,7,8,8 231:13 rocky 54:18,25 57:15 77:23,25 78:12 80:17,18 80:22 81:9,24 82:3 86:11,20 152:15,19 153:1,11 154:18 156:3,7 156:9,13 160:11,13,15 166:18 167:10 181:20 182:8 role 14:25 16:4 17:17,22,25 76:10 77:5,10 rolled 138:9 roller 132:13 173:12,13,19 173:20,24 174:1,2,3,4,8 174:10,13,17 174:19,20,22 rolling 48:23 Ronald 2:12	room 205:9 roughly 127:10 route 183:13,17 183:19,20,22 183:24 184:3 185:7 routinely 100:20 ruled 52:2 rules 238:9 run 84:15 85:2,4 235:17 running 78:7 84:20 runoff 232:17 232:18 rushing 231:13 <hr/> S S 3:1 241:1 safe 58:13 161:19,21 165:17,19,22 194:11 safely 8:14 safety 33:12 49:3,11 50:11 96:25 132:4 230:24 231:2 233:14 salient 119:18 127:11 San 5:19 31:8,10 144:14 Santa 3:20 52:6 198:6 satisfied 133:8 134:2 saw 87:19 146:16,17 183:10 185:11 185:16,24 186:2,6,12,15 186:22 194:1 195:25 saying 121:8,16 145:16 161:6 167:3 168:6 187:6 188:18 188:20,22
reviewing 6:25 14:11 24:18 27:9 31:21 36:20 56:22 63:13 67:25 96:10 112:1 139:1 141:19 155:5 200:15 221:14 revolutionary 46:20 revolutions 46:17,23 ridden 174:22 ride 174:14 riding 174:8,19 174:20 right 4:2,16,22 5:17 6:9,14 7:5 7:18 9:13,25 11:4,9 12:13 14:14 16:17 23:3 26:3,8,22 27:13 28:2 30:10,22 31:6 31:12 32:1,5,7 32:11,17,19,25 35:24 36:1,6 36:25 37:16 38:15 39:10,14 41:1,5,8,13 44:12,15,24 47:15 49:7 54:10 55:13,17 56:4,9,15,18 59:12 60:20 64:19 65:9,23 66:11,22 67:4 67:5,8 68:1,5,8 68:11 69:22	rightly 233:8 ring 52:7 risk 49:4,11 70:7 100:20 101:11 101:13,15 128:23 131:17 risks 211:20 risky 164:7 236:17 risk-managem... 97:2,8,13,17	rivers 182:15 river's 181:2,11 205:2 222:10 225:7		

189:11,18	second 14:10	144:22 145:3	219:7	188:4,7 228:13
194:5 224:15	51:2 57:2	155:10,14,24	setting 7:20	230:12 234:15
237:7	63:17 82:14	175:23 176:7	182:11 223:5	236:8 239:2,6
says 14:13 16:14	207:13 218:14	178:17,17	severity 125:2	Sierra 144:24
16:21 30:23	second-to-the-...	182:10,17	shared 45:17	sight 171:18,19
32:3,22,24	84:9	206:9,17	shear 159:25	214:23
35:23 42:25	section 61:24	selected 82:4	ship 48:15 49:2	sign 55:9 100:6
54:16 77:25	73:8 77:21	93:10	49:3,10	100:10,16
116:21 141:11	83:25 93:15,16	selecting 149:17	ships 48:12	164:13 182:24
164:14 180:4	93:19 94:2	send 26:13	shoes 158:25	184:3,9,17
193:12 213:1	95:5 122:3	sending 236:16	short 53:15	185:11 186:12
215:6 216:19	162:23 201:19	sense 16:7,24,25	shorter 161:14	186:12,15,22
237:11,19	201:19,20,23	17:1,5,7,8,11	211:7	215:4,6,11,18
scalloped 159:6	201:23	127:21 205:7,8	shorthand 240:3	215:21 216:3,5
scenarios 34:20	sections 156:19	205:9 220:15	240:4,8	216:6 217:4,12
scene 65:21	216:12	senses 73:1	show 141:15,23	217:25 219:4
134:10 207:17	see 24:4 61:19	sensical 17:10	142:15 171:12	221:11,12,15
scenes 194:1	71:22 74:10	sent 67:18,23	182:22 236:9	221:25 222:16
science 29:25	77:22,23 78:1	69:13,18 89:12	showed 151:4	223:17,23,25
38:19 45:21,23	92:14,20 95:17	94:1 140:25	showing 150:23	224:5,10
46:16,19 115:1	103:13 119:25	236:11,14	150:24 155:13	225:25 226:13
191:5 207:4,6	140:20 141:10	sentence 16:19	234:16	229:6,16,19,22
sciences 3:22	142:13,14	84:9,11,22	shown 205:16	230:7,15,18,21
43:2 45:24	145:7,16,20	91:6,11 92:9	206:14,22	230:22 232:8
46:24	154:13,22	116:21 117:1	213:18 218:18	235:25 237:3,3
scientific 17:12	156:6,15,16,17	120:17,25	218:24 237:13	237:4,7,8,10
34:17 35:20	157:11,16	162:7,8 199:8	shows 194:17	237:11,13,15
36:13 37:25	158:20,24,24	200:6	195:7 198:15	237:16,21,24
40:3,9,17,19	159:1,20 165:5	sentences	218:3 220:21	239:8
40:20,22 41:14	167:13 176:8	162:22	230:14 234:18	signal 216:21
41:15 42:12	176:10 177:21	separate 22:25	239:4	217:20 218:2,8
43:10 44:23	177:25 179:3,4	54:24 57:14	Shultz 2:8	218:10 220:5
45:1 82:22	183:4,7 184:3	61:8,20,25	side 155:7,8	228:24 229:2,7
92:13,19 93:9	184:13,17,17	September	170:3 199:21	229:9
122:23 128:10	184:21,23	96:24 126:8	206:12,12	Signature
175:16 197:3,5	185:17,19,23	127:10	sides 28:14	241:20
scientifically	185:25 186:25	serene 153:23	37:19 76:25	signed 83:4
43:5 122:14	187:3 200:12	series 236:15	222:25	significance
scientist 114:19	203:4,8 206:10	serious 44:8,18	sidewalk 221:23	198:4
scientists 38:6	206:20 209:20	189:15,17	222:1,10 225:6	significant
scope 62:15	216:17 223:25	seriously 111:12	225:11,15	197:17 230:23
190:20	224:6,24,25	serves 181:10	sidewalks 8:18	significantly
sea 48:22	231:23 233:18	Service 67:18	224:7	226:12
SEAL 241:22	237:24	238:10,19	Sieff 2:3,14 3:10	signs 33:10
season 127:9	seeing 144:16,20	services 6:8,10	13:6 35:3	99:14,17 101:6
146:13 168:6	185:24 187:13	set 70:9,17,20	53:13,18	168:5 182:24
231:19,25	seen 37:16 65:24	83:3 146:20	113:23 115:8	182:25 183:4,5
seasonal 125:22	89:20 109:13	174:23 233:3	115:12 132:2	184:14 186:7
Seattle 48:9	125:11 137:1	sets 215:24	147:8,13,22,25	186:19 187:11

187:14,17	155:14 158:4	138:16,17	108:20 115:20	187:20 238:5
203:4,8,10	168:23 189:16	141:15,16,23	123:10 157:13	speed 84:20
215:25 216:11	193:19 201:13	141:24 142:6,7	158:3 174:20	spend 59:4
219:9 222:21	224:13 234:16	142:13,13,14	176:4 182:4,13	spent 27:16
222:23 225:2,4	238:5	142:16,17,20	216:16 219:20	143:22 144:5,9
232:11,14	site 22:22 80:18	142:23,23,25	228:17 230:21	spoken 202:8
236:18,22,24	83:15 134:14	143:6,10,10,13	sort 6:8 13:8	spot 206:21
238:22 239:5	134:20 139:17	143:20,20	119:17 120:18	spread 125:13
silly 204:20,23	139:18 141:11	144:13,16,19	135:9 136:11	spring 144:7
similar 33:23	141:13 147:11	144:21,22,25	140:14 197:4	232:18
43:23 81:5	148:24 150:14	145:3,7,11,14	198:7 212:11	Square 51:10,20
107:25 134:15	151:1,25	145:17,18,19	232:23	stable 34:24
146:20 147:1	181:24 183:14	145:20,23,25	sound 4:22	161:17 163:6
183:4 195:20	183:20,23,24	146:2 161:7,21	13:25 27:13	164:10
195:22	186:16,18	161:23 162:1	191:5,5,6	staff 111:6
similarities	205:15	163:2,3,10,11	sounds 87:16	112:14,15
103:21 108:5	sites 182:17	163:12,13,21	source 95:11	114:22 131:16
similarly 61:22	sitting 66:19	174:15,24	South 1:2 2:9,10	177:20,20
simple 8:15	205:8	175:19,20,24	2:19 15:19	stance 161:14
29:19 49:24	situation 28:18	175:25 176:5,9	17:6 55:22	stand 153:1
150:16 177:2,5	70:6 101:21	176:9,11,12,19	73:13 137:23	167:10
202:1	103:25 136:15	179:4 195:24	144:4,10 166:3	standard 45:19
simply 36:23	136:17 153:15	203:19 204:1,4	193:11,17	100:14 215:19
113:25 114:6	163:3 169:6	204:6,7,17,21	214:20 238:23	215:22,24
187:3	223:1,21 224:3	205:1,6 233:18	SOUTHERN	216:2,7,10,12
single 79:1	233:5	snow/foam	1:3	216:23 217:1,5
168:2	six 199:3 210:14	109:19	so-called 17:1	217:10,13,16
single-lens 206:6	212:21 213:11	Society 13:9,16	space 81:10	217:24,24
209:5	213:14,19	soft 161:25	speaking 115:16	218:1,3,4,5,7
sink 163:14,14	size 220:6	162:17	specialist 14:20	218:11,16,22
Sioux 1:9 2:10	skills 212:8	software 207:14	132:22	218:22 219:1,2
2:19 4:3,6	214:4	210:24	specialized	219:4,7,17,21
15:18 17:6	skimmed 103:9	sole 6:5	74:23 75:6,20	220:10 230:19
55:21 79:13	slip 33:8,25	solely 103:8	specialties 32:18	230:20
80:6,10 81:6	86:17	solid 34:24	32:22,25 33:2	standards 46:10
100:1 101:10	Slipperiness	161:17 163:6	specific 80:16	53:8 216:18
101:17 109:24	65:3	164:9	82:11 98:15	217:15,18
110:17 115:18	slippery 227:6,6	solitary 79:1	106:23 174:11	218:7 220:1,3
122:9 132:17	slowly 161:14	168:2	182:4 227:10	220:16 221:8
166:16 180:8	163:19	solutions 98:5	specifically	standing 88:6
180:14,16	small 89:10	98:20	80:17 101:14	150:23 152:25
205:10 236:10	118:22 138:22	somebody	128:15 151:19	153:10 154:7
236:14 238:23	138:25 142:15	218:18 237:5	172:23 194:24	154:16 156:2
sir 5:11 10:1	165:6 175:25	son 139:15,20	specifies 36:9	156:10,11,16
23:14 31:12	176:5	140:7	speculate 53:20	156:19 157:11
42:17 43:3	smallest 210:21	sorry 19:5 25:20	speculating 85:4	157:15,22
44:2 64:7	Smith 2:8	36:15 40:5	speculation	158:23,25
110:6 112:19	snow 85:8,14	84:6 91:10	54:11 56:10	181:17 194:18
114:17 143:23	86:7 138:13,15	98:9 102:16	186:3 187:8,10	205:18 209:3

223:24	216:22 217:22	155:1 188:10	sufficient 12:16	168:13,21
standpoint	227:20	stronger 228:22	41:22 101:7,19	supported 50:23
185:21 233:10	states 1:1 14:19	228:23	sufficiently	supporting
start 82:14	47:21 48:7	strongly 20:13	100:17 212:11	23:22
96:10 138:3	145:6 210:22	20:15,20 21:8	222:17 223:19	supports 95:4
started 110:4	236:14	structured	Suite 1:21 2:5,9	supposed 14:21
111:10 138:7	statistical 38:24	235:11	sum 48:23	sur 164:3
206:5,7,7	39:3 135:14,19	student 198:5	summary 54:16	sure 5:4 11:15
starting 7:11	137:7 197:14	studied 101:3	54:16 55:24	14:8 27:14
115:22	198:4 211:4	studies 174:23	70:1 201:20	31:9 38:2
starts 93:16	statistics 42:15	174:25 175:4,7	summer 125:13	39:19,21 40:6
159:15	stay 69:24	study 59:6	144:7,8	41:11 45:2
state 1:22 3:11	164:14 226:22	175:16 176:16	summertime	48:17 53:15
6:3 7:6 35:18	227:7	197:4,6,13	145:7	56:7 57:13
36:12,18 47:3	stayed 195:7	198:12 201:25	super 188:9	59:1,13 61:2
47:10,21 73:12	staying 195:2,4	229:25	supervise 10:15	64:17 66:15
73:16 82:17	197:17	stuff 142:20	55:16 71:6,8	86:5,24 90:16
84:2 117:1	stenographic	143:9,17	71:13,14,14	91:13 93:21
120:5 139:16	13:5 228:11	145:10 161:25	188:15 189:3	99:16 112:13
148:23 161:18	234:12 236:5	164:2 174:15	189:10 214:21	115:21 127:12
161:22 184:1	240:4	175:2,2,8,12	supervised	127:24 129:4
186:20 187:1	step 34:22,24	175:18,21	188:12	134:8 135:16
191:12 193:16	35:12 36:10	176:8,16,18	supervising	136:7,12 143:2
201:8 205:14	86:10 87:5	203:16 204:21	211:17	150:2 163:16
214:20	88:9 89:4	subject 9:4 55:5	supervision	165:23 166:6
stated 16:8	98:19 161:4,20	55:11 103:25	31:23 71:21	166:14 170:18
178:16 182:7	163:1,10,11,13	111:14 152:3	72:2,4,20,25	171:4 177:6
Statema 103:8	163:17,22	submitted	73:5,9,13,16	178:10 188:4
statement 19:10	164:2,7 199:12	139:25	73:19,22,23,25	189:7 190:22
21:4 23:23	stepped 34:22	subsection	74:2,6 193:9	219:15 220:14
37:8,15 46:5	84:17 154:9	162:23 200:16	193:19 201:10	224:23 228:18
47:4 52:21	stepping 163:15	subsequent 20:6	201:18 202:5	235:4
105:20,24	steps 132:21	50:19 57:17,18	214:2,24	surface 34:10,23
109:22 111:7,9	134:24 135:4	80:12 97:18	supervision/m...	34:24 86:12,20
115:15 116:2,6	161:14	subsequently	10:3	161:17 163:5,6
120:2 129:23	step-by-step	104:14	supervisory	163:13,16,18
157:17 162:23	20:24	substance 48:24	10:21 72:18	164:3,10
176:23 177:8,9	sterile 189:8	substantial 6:17	136:4	168:11
201:20 212:24	stimuli 174:24	108:5 117:21	supplemental	surmise 161:25
221:8 224:13	Stop 199:7	119:4	67:16 96:22	surprise 184:8
227:1,3,23	stopped 187:13	substantially	102:3	237:23
228:2,7	storm 138:9	107:25 134:15	support 12:14	surprised
statements	stream 78:9	146:20 147:1	12:17 23:20,21	179:11 186:15
18:24,24 19:11	street 235:21	150:19 195:20	32:4 43:11	surround
19:15 20:1	stricken 49:17	195:22 226:20	46:9 55:25	234:25 235:1
23:21,22 80:20	50:1	substantiate	57:19 84:18	surrounding
80:21 114:9,21	strike 35:3	49:9	94:17,22	182:8
130:21 156:14	54:11 60:12	subsumed 11:1	162:18 163:13	surveyed 174:19
179:8,25 180:6	113:24 132:2	93:8	163:16,18	suspect 19:1

suspected 157:20 swiftly 54:19 swim 196:17 swimming 226:23 227:1 switch 53:14 sworn 3:4,7 symbol 218:16 symbols 219:9 219:11 synonymous 14:15 89:5	90:15 148:9,11 149:6 181:18 181:21 202:22 talking 45:7,10 58:15 60:13 84:7 100:19 128:5 151:2,16 203:14 214:13 223:25 224:1 talks 121:12 tall 142:16 155:7 155:9,23 176:10 209:25 210:9,10,13,19 211:12 tape 169:18 170:19 171:7 171:14 208:5 task 62:15 73:4 100:25 101:1 134:18 212:14 tasks 133:21 technical 52:14 92:13 technically 145:24 techniques 40:3 40:10,17 44:22 44:23 92:20 93:7 219:18,22 219:24 tell 11:22 13:11 18:12 19:6 23:14 24:2 27:6 33:21 60:8 62:21 67:10 73:18 88:11 90:5,7,8 135:22 151:7 151:17,20 154:22 155:2 158:6,17 159:8 159:14 160:4,4 160:8,10,14,21 160:24 162:19 170:21 179:23 190:17 193:4 194:24 206:3 236:2	telling 12:15 67:22 68:21,22 194:14 tells 158:25 180:5 temperature 166:15 temporally 172:21 temporary 231:18 233:16 ten 27:17 28:6 43:18 46:15 155:23 210:25 225:1 term 16:25 21:13 40:2 70:4 71:5,20 72:4,6,7,7,10 72:11,13,15,16 72:20,23 73:5 73:7,16,25 74:1,10,14,18 74:20,20,22,23 74:25 75:3,5,5 75:10,12,15,19 76:1,6 78:4,15 78:17,18 79:6 80:15,25 82:5 93:5 97:23 98:15 100:20 117:7,18 166:2 166:3,4 206:24 229:3 termed 63:14 terms 5:12 27:15 41:13 69:7 76:12 80:15 87:24 89:5 93:10 95:4 131:20 179:25 195:23 217:18 217:19,21,21 223:19 224:2 237:4 238:15 terrible 190:10 190:16 tes 195:15 test 91:25	197:16 198:4,8 testified 3:8 4:21 5:6 17:13 21:5 23:11 39:8,11 40:23 49:13,14 50:20 51:5 84:25 111:13 114:7 133:15 169:10 181:15 184:2 195:18 203:12,18 213:2 216:5 217:3 235:24 testify 8:5 32:11 34:16 36:23 49:1,2 50:6 88:17,19,24 99:3,6,22 100:1,12,16 156:5 184:20 187:16,19 197:2 216:9 233:21 testifying 4:2 10:10 34:15 47:18 51:13,18 99:3 169:15 testimony 12:21 13:18 17:4 18:20 19:4,7 19:22 20:7,12 21:6 24:10 29:1 44:11,21 47:17,19 52:2 52:12,15 53:1 53:9 83:20 98:23 99:23 111:5,19,22 112:14,19 113:14 114:4 143:6,8,19 160:20 181:3 183:16,18,25 184:6,11,13 203:21 204:10 204:19,23 212:16,19 213:6,10 240:4 testing 229:21	tests 197:25 text 220:20 221:1 textbook 45:6,8 textbooks 45:9 45:10 Thank 56:15 62:24 66:22 105:5 115:6 116:25 137:13 146:4 239:7,9 theory 29:10 198:8,9 they'd 196:13,16 thick 141:16 165:13 168:12 thickness 165:17 165:19 168:18 168:20 thing 62:6 87:18 106:5 135:9 179:3 189:15 190:10,16 203:14 207:15 212:11 222:24 235:2,23 things 8:13,14 8:17 11:13 37:23 38:1 53:23 60:18 69:6 70:25 84:22,23 88:3 88:7 97:5 103:9 117:10 120:20 132:13 163:10 165:8 168:17 185:22 203:12 214:18 220:4,7 229:12 234:5 235:15 think 12:16,23 13:12 14:16 15:13 22:2 23:23 27:25 29:24 31:16 34:5,8,20 43:9 46:8 50:3,3 51:24 56:3,5 56:14,22 57:6
---	--	--	---	---

60:18 62:20,21 73:21 77:12 84:19 85:6 87:11 88:13 89:12 95:3 98:12 99:11 100:10 102:11 103:2,7 108:2 110:2,8 117:24 118:10 119:12 119:21 122:10 123:18 127:14 141:15,21 142:6,19,23 145:14 147:4 147:12 148:19 148:20 149:25 157:4 161:16 164:10,16 165:2,22 167:4 167:7 168:8 169:1 173:24 174:2,2,8,13 174:14,17 175:17 176:9 176:12 178:24 179:22 180:2 181:4,7,12 186:2 188:25 189:24 190:17 190:20 195:1 196:11 197:12 197:13,14 198:5 200:5 203:25 204:4 205:1 209:3 211:11 213:20 214:7,24 215:2 215:15 218:2 225:3 231:11 232:12,18 235:8 238:14 thinking 59:21 133:6 160:14 204:21 thinks 133:2 thir 112:16 third 231:8 thorough 123:4	123:6,12 190:6 thoroughly 111:11 thought 30:11 46:17 80:23 85:8 102:25 133:19 135:6 142:5,12 150:1 150:5 174:19 179:5 181:6 203:18 204:5 204:13,20 216:16 224:4 thoughts 234:21 thousand 46:22 218:25 three 12:6 91:11 109:18 173:22 192:20 198:25 199:1,2 222:22 223:4 thrown 141:6 tier 231:2 tiers 156:11 till 44:20 Tim 139:19 time 6:17 27:15 27:20,23 33:7 38:12 41:19,19 41:20 43:3 46:7 48:22 49:5 50:16 57:4 59:4 63:1 63:5 65:12 89:21 101:12 107:20 108:9 108:17 114:11 118:1 123:5 126:4 133:18 135:13 138:2 139:19 143:22 144:5,9 159:23 162:8 178:16 178:17 191:12 199:13,23 200:2,20,21,23 200:24,25 212:25 222:13 223:9,15	233:24,24 236:17 237:18 240:5 timeframe 122:21 146:19 146:25 times 4:21 7:8 29:9,22 39:8 41:4 73:10 106:23 119:18 124:17 127:12 171:22 173:10 199:17 200:20 232:24 tip 235:17 titled 6:25 63:18 65:2 today 4:3,12 8:4 9:7 14:22,25 17:13 23:11 27:4,23 33:22 35:14 36:5 37:25 47:18 59:7 62:3,22 65:12 66:19,19 68:21 133:25 135:24 156:21 181:3 204:10 Toft 65:20 67:16 Tofte 89:20 90:8 Tofte's 67:7,11 90:10 told 11:3 25:8,11 25:22,24 29:22 52:13,16,17 86:6 95:25 125:24 126:3 148:18,20 153:18 154:6 157:11,14 158:14 165:11 179:20,22 227:14 toothbrush 8:15 top 34:10 54:25 57:15 77:23 82:11 86:12 141:11 156:12 157:23 158:1,8	159:2 162:17 173:24 174:8 174:14,20 235:5 tornado 127:5,9 127:13,17 tornadoes 126:23 127:6,7 total 183:8 tower 183:18,19 183:21,23,24 185:8 186:7,13 186:16,18 203:5,9 232:22 Town 51:10,20 track 173:25 174:6,9,11,21 tracks 174:19 train 52:9 trained 225:19 training 90:19 91:2 96:24 97:7,11 98:24 102:5,9 trains 174:20 trajectory 87:7 trans 113:12 transcribed 140:11,24 141:1,4 148:22 transcript 69:10 111:2,17,25 114:7 185:5 240:6 241:4,5 transcription 141:8 240:8 241:6 transcripts 18:23 19:10,23 20:2 21:6 66:5 83:10,18 84:1 108:18,23 110:3,10 148:24 179:8 180:1,20 transient 107:13 transmittal 67:24 Transport 52:6	travel 27:18,20 trial 5:7 32:8 56:21 57:4,6 60:17 61:7,18 62:3,18 63:1,5 65:12 66:20 triangle 218:16 218:20 tried 79:8 99:11 156:8 206:8,16 trier 8:9 12:22 13:18 16:4 trip 33:8,25 34:13 36:7,8 36:10 86:10,13 86:14,14,21,22 87:3 88:8 89:5 tripped 34:3,7 34:18,21 35:10 36:14,19 84:16 85:18,21 86:23 tripping 86:16 trouble 102:23 189:5 234:3 true 7:24 9:1,21 12:22 13:19 14:2,15 18:4 21:8,12 22:6 28:9,12,15,18 29:16 36:11,16 36:17 37:2,21 38:25 39:1,12 42:10,18,24 44:4,9,13 45:13,22,25 46:2,25 47:4,7 47:10,13,22 48:9,14 49:7 49:16 50:8,25 51:4,7,12,21 52:1,4,11,20 62:14 63:24 64:14 66:24 70:8 73:6 74:12 75:22 77:7 78:18,21 79:5,9,16 82:4 82:8 93:7 109:8,11,14
--	---	--	--	--

110:6,22	60:18 63:14	underneath 32:3	235:16	utilize 193:17
111:13 112:9	70:25 83:21	34:23 167:11	uniform 164:4,6	207:21
113:17 115:4	84:1 86:9	174:10,21	United 1:1 47:21	utilized 74:14
118:21 124:2	91:17 104:14	underpinnings	48:7 210:22	122:8
127:11 130:15	104:18 105:17	192:12	universally	utilizes 73:13
130:17 146:16	105:19 107:24	understand 15:2	45:16	utilizing 122:12
146:22 147:6	108:18,23	15:8,11,13,20	universe 87:1	201:14 231:22
153:13 154:5	109:16,17	15:22,25 16:10	University 3:19	U.S 67:18
156:23 160:9	116:23 118:2,4	41:23 44:17	unknown	
167:18 170:24	119:5,19	46:22 66:17	116:12,22	<hr/>
174:15 177:15	132:18 142:11	72:2,21 76:20	unreasonable	V
181:15 186:1	143:15 148:2	76:23 86:25	202:15 204:24	v 47:24
189:4 190:8,24	155:7 163:10	90:16 91:5	unseen 106:9,13	vague 20:23
193:8,16	163:23 164:1,4	93:22 97:23	107:1,5,12,19	29:8 118:24
201:13 215:25	164:10 170:25	102:2 108:8	110:23 113:19	valid 122:14
219:9 220:24	185:22 206:17	129:5 139:5	untenable 225:3	128:9 197:3
223:2,13	207:12 208:2	142:5 145:17	untrue 46:4	198:7 210:23
225:20 228:1	213:23 218:5	146:8 150:17	unwilling 24:2	Validity 63:19
233:24 234:10	218:25 223:4	152:5 167:2	un-similar	Valley 52:6
238:18,24	233:8	189:14 218:13	201:15	variable 163:13
240:7 241:5	type 32:15 46:11	224:8 227:24	upper 48:19	209:12,12
truly 136:9	71:17 73:22	229:24 237:11	143:23,24,25	232:8,10,14
truth 63:14,17	76:3 100:5	understandable	144:5 145:4,8	various 80:5
119:16	101:5 103:23	76:22 220:20	166:4 181:22	117:19 120:23
truthful 150:10	182:10 186:22	understanding	upside 173:14	177:20 179:2
try 76:20,21	208:14,24	17:11 18:15	upwards 22:24	Vegas 51:10,20
82:10 135:13	209:4 232:19	46:21 94:18	urban 182:1,3,9	vehicle 33:18
trying 16:18	types 101:3	97:3 104:25	182:11,14	235:18
46:22 57:5	134:25	105:3 106:24	223:5 235:12	venued 48:7
58:13 64:12	typical 211:25	124:15 125:23	235:20	verbal 193:5,8
73:15,18 76:3	212:7	131:16 150:4	USDA 238:18	193:18,22
99:16,21	typically 37:18	157:20 175:18	use 8:13,13,17	194:1,9 195:6
102:14 131:21	41:7,15 46:19	181:13	43:10 70:5	verbatim 240:3
137:4 139:5	72:25 86:15,18	understands	71:6 73:5,20	verifiable 38:20
150:22	92:8 98:17	211:20	74:12 75:10	version 215:16
tumbled 88:2	126:1 127:5	understood	76:4,6 80:24	226:10
turbulent 136:3	237:3	110:12 147:16	93:5 102:12,23	versions 215:14
226:23 227:2	typing 140:13	151:20 227:3	117:7 201:5	versus 51:10,20
turn 45:18 52:8	<hr/>	230:4	207:5,18 208:3	51:23 52:5
54:15 69:22	U	undertake	208:7,25 209:4	112:17
93:3,14 205:13	U 241:1	126:11 133:22	220:4,5,5,6	vessel 48:13,22
turning 115:13	ultimate 183:14	undertaken 98:1	229:2,15,18	50:14
turns 96:13	ultimately 52:19	131:13	235:2	veteran 48:12
twenty 28:6	104:16 186:14	undertook 97:21	useful 18:15	video 44:1 65:22
112:16 153:4	Umm-hmm	100:13 101:18	96:16,19	67:7 109:6
153:10 225:1	180:15	131:17	user 8:15	Videographer
two 19:17 34:20	unaware 107:1	uneven 34:10	users 172:4	2:12
34:25 35:2	107:5	86:11,20	uses 30:10 40:22	videos 67:11,16
46:20 59:12	Underlying 65:3	unexpected	utility 33:24	90:9
				videotape 1:20

view 8:21	W	236:20 237:17	237:2,3,19,21	103:19 122:16
145:18 155:20	wait 69:24	wanted 53:13	237:22 238:22	127:8 151:23
160:2 205:15	walk 19:9 24:3	60:14 76:1	warnings 7:2,3	163:6 170:7
205:16 206:7	49:4,5,11	147:16 149:11	8:19 33:10,17	177:16 178:8
viewed 65:25	161:7,12,12,14	151:24 224:3	41:17,18,21	184:20 185:11
viewfinder	161:16 165:17	229:8 232:11	75:8,9 97:4,16	186:7 187:18
206:10,14,23	165:19,22	wanting 164:23	97:17 98:11,13	187:25 193:22
viewing 151:23	217:17	wants 177:7	103:23 126:23	194:3 201:9
151:24	walked 84:15	warming 38:3,7	127:1,5,7,13	207:16 210:18
viewpoint	85:2 183:9	warn 55:5	127:17 169:2,6	211:22 221:10
210:23	198:18 205:4	169:18 172:23	169:7,9 172:4	223:23 235:14
violated 235:13	walking 48:19	225:17 231:9	216:25 220:23	235:17
virtually 78:21	48:19 84:4,20	warned 170:16	222:12 223:8	ways 38:20
visibility 33:6	91:7 160:14	225:16 235:19	226:15,16	217:25
visible 165:3	174:10	warning 41:22	228:4 232:7,21	wearing 138:8
236:19,22	walks 50:12	41:24,25 46:11	233:2,4 235:23	weather 137:25
visit 125:9	walk-through	55:9,11 99:14	236:18	138:8
134:20 135:13	100:24,24	99:17 100:6,10	warns 226:3	website 39:23
137:21,23	wall 34:11 80:19	100:16 101:6	warrants 124:18	47:2
140:8 141:12	156:12 158:9	168:24 169:5	Washington	week 69:14
141:13 146:19	159:6 194:17	169:11 170:10	48:8 49:8	234:18
147:11 148:24	224:20	170:21 171:11	wasn't 38:9,12	weeks 59:19
150:14,21	walls 54:19	172:12,14	88:14 89:21	69:1,2 89:13
151:25 205:15	77:20,22,25	182:24,24,25	118:8,9 150:16	weighed 20:13
232:12	78:12,14 81:9	182:25 184:3	151:11 169:23	20:15,18 21:7
visited 134:14	81:24 82:3,12	186:12,22	watched 34:12	weight 21:15
144:19,25	86:12 152:19	187:11 203:10	water 34:7,18	24:6 103:10
146:5,10	154:18	215:2,4,5,8	36:19 50:15	162:18 168:13
visiting 80:18	wander 225:6	216:3,6,11,19	78:9 83:15	168:21 212:25
146:25	wandering	216:25 217:2,4	104:11,16,19	weighted 20:20
visitor 116:18	224:6	217:11,13,23	104:20,22,24	Weiss 47:23
visitors 54:20	want 21:1 23:19	218:14,15,23	107:23 109:15	48:4,4,11 49:4
109:12,15	54:12 57:2	219:3,8 220:3	116:11,11,19	went 29:11
110:1 116:10	69:25 82:13	221:11 222:19	116:19 124:14	63:21 83:15
125:5,12	86:24 90:16	222:21 223:11	136:3 155:8	104:11 106:15
126:11 127:22	91:13 97:14	223:17,22	156:3 159:8	118:7 124:14
180:9,17	99:15 100:7	224:2,4,9,10	166:5,21	137:20 139:10
visual 73:1	101:25 113:1	224:23 225:2,4	180:18 221:13	147:19 148:1,2
163:4,7 174:24	127:1 128:16	225:10,12	226:23 227:2	152:12 154:2
Visually 65:2	129:4 131:22	226:2,19,21,22	228:10 231:13	156:3 165:24
visual-motor	133:5,13,16	227:10,16,16	way 7:25 8:2	166:2 181:24
33:8	135:3 147:9	227:18,22	19:1 20:3,23	195:9 221:12
vis-à-vis 21:6	152:8 161:4	228:3,15	36:9 41:12	weren't 68:19
vitae 30:6,23	167:2 182:23	229:15,22	42:8,9 43:13	210:4,5
vital 17:16,22	190:5,22 191:4	230:3,7,21	43:25 67:22	Western 48:8
vocal 193:17	192:14 200:10	231:24 232:9	68:22 76:2,21	we'll 4:16 23:18
194:9,15,25	205:11 215:4	233:15,17,25	77:12 82:15	27:22 43:12
VOLUME 1:15	222:24 224:5	235:10,25	83:2,7,22 88:1	133:11 239:8
vs 1:8	225:12 232:4	236:22,24	92:9 94:7 99:8	we're 44:18 61:2

115:22 128:5 161:16 163:15 163:16 165:6 223:25 224:1 we've 83:5,8 124:12 147:10 181:18 232:15 whatnot 48:21 Whereabouts 4:14 wheth 53:6 white 142:20,21 142:22,23,25 143:1,6 145:10 161:25 164:2 174:15 175:2,2 175:8,12,18,21 176:8,16,17 204:21 whitecaps 48:21 widens 161:15 width 221:19 wilderness 182:1,4,6 willing 23:24 wind 48:20 windy 48:20 winter 144:7,11 withdraw 51:8 witness 2:14 3:4 3:6 6:25 7:23 14:11 18:20 19:3,7,14,22 20:5,8,11 21:6 24:18 27:8 36:20 56:22 63:13 67:25 78:21 79:1 87:22 112:1 114:9 115:7 137:19 139:1 141:19 155:4 188:3 200:15 212:19 221:14 228:9 241:20 241:22 witnesses 24:10 24:11 134:12 woman 170:21	wonder 119:16 142:10 145:14 wondering 175:19 Woods 2:8 25:23 word 19:24,25 72:8,12 77:22 78:19 179:11 201:5 204:23 216:21 217:20 218:2,8,10 220:5 228:20 228:24 229:2,4 229:7,9 words 21:10 35:22 37:12 41:12 92:16,22 93:20 120:7 158:12 182:14 work 5:13,14,16 6:11,13 28:4 29:16 32:5,7,9 32:10,15,15,19 39:17 56:19 57:3 60:13 62:25 63:21 64:4 65:11 66:19 79:13 109:6 124:24 229:13 worked 28:8 33:16,21 39:12 working 142:5 workplace 33:17 works 46:21,23 world 37:25 38:13 214:19 worthy 198:13 wouldn't 7:25 7:25 59:3 64:17 111:18 164:13 189:8 190:11 238:19 write 6:15 28:18 28:21,22 29:5 62:10 76:21 77:3,9 91:12 92:8,12 147:23	157:24 194:21 200:4,10 writing 57:18 58:20,24 59:17 76:17 140:13 140:15 229:12 written 7:22 18:3 19:22 28:24 59:23 61:4 63:15,18 65:2 84:3 201:23 213:13 217:8 wrong 36:25 41:13 42:7 176:4 190:11 190:13,18 wrongly 233:9 wrote 6:19 50:5 50:9,18,21 51:2 65:19,24 70:12 73:11 92:4,8 93:19 120:7,15 121:3 151:9 192:5,6 194:2,7,24 199:23 220:14 X X 104:2 Y yeah 5:2 20:17 20:22 25:18 27:17 31:5 36:6,20 42:8 47:16 53:10 64:25 77:7 78:2 90:1,12 102:23 111:1 111:16 118:3 118:24 125:18 126:18 127:8 131:6 133:19 134:18 135:8 141:23 144:6 149:6 155:22 158:5,20 169:21 175:5 178:24 179:13	181:18 186:18 192:24 194:16 208:2 209:11 209:20,24 228:1 232:3 233:5 year 6:20,21,23 24:19 106:20 106:23 125:9 125:14 168:2 175:13 209:8 211:22,25 212:13 213:21 213:22 214:3,5 years 4:22,23 5:1 28:9 40:24 41:4 46:15,22 48:12 82:19 104:3 125:7,11 214:22 yellow 140:17 169:18 170:19 171:7 229:11 yesterday 236:15 Yglesias 7:7 169:15,17,19 Yoedicke 2:3 147:21 young 10:15 71:10 83:21 103:18,22 104:11,15,19 104:22 105:7 106:5,8,15,25 107:10,16,23 118:12 136:4 191:13,19 192:20 199:14 199:24 200:3 201:11 younger 164:21 198:21 200:18 Y-G-L-E-S-I-... 7:7 Z Zaiger 34:18 36:14,18 100:3	104:24 105:10 106:12 107:12 107:16 108:1 108:22 124:14 183:15 186:8 186:14 Zaiger's 108:17 zero 198:1,2 zoom 208:14 zoomed 208:17 Z-35 215:12 220:10 Z535 215:14,16 216:10,18,23 217:1 218:22 220:1,16 221:1 221:8 226:10 229:8 230:19 \$ \$40,000 27:10 1 1 1:15 2:17,20 30:4,22 39:6 54:18 61:13 77:20,24,25 78:1 82:14,14 96:5,18 103:5 1-2 3:2 10 5:1 41:20,25 61:4,24 70:1 77:21,24 83:25 125:7 126:18 138:6 142:19 155:17 163:23 174:7 176:10 198:18 205:19 10'ish 192:21 10:14 53:17 10:22 53:17 100 5:13 222:9 11 137:20 139:17 146:5 146:10 147:12 147:19 148:1 148:12 152:1 153:19 154:6 191:10 201:4 214:5,7
---	---	--	---	---

11th 138:17 147:11 181:23 11:47 115:10 110 4:21 12 118:13 138:6 174:7 192:21 205:14 214:3,5 214:8 12:28 115:11 13 7:5 24:18 54:15 56:1 69:25 74:9 77:19,24 113:25 200:14 202:2 13th 25:14,16 14 211:19,25 212:13 213:21 14th 68:1 15 35:8 112:18 113:3,13,15,25 114:18 115:3 142:20 205:19 16 39:7 171:21 17 39:7 112:18 113:3,13,25 114:18 155:14 155:16 18 26:3 39:7 147:2 195:20 219:5 18th 34:19 146:22 19 35:8 39:7 138:17 182:23 215:11 217:12 236:3,3,4 19th 25:21,22 26:5 1977 63:18 1980 10:24,25 11:10 104:8 115:18 116:1 148:21 1984 148:21 1990 46:3 1991 7:12 1999 30:24	2 2 2:18,21 54:14 54:23 57:13 77:21 82:15 84:2 91:8,9,10 92:11 115:14 118:22 2:07 188:6 2:11 188:6 20 1:16,23 103:21 125:11 139:6 155:9,17 171:16 176:10 20th 156:22 2002 215:15 2008 65:2 2011 13:7 16:2 215:17 217:17 217:24 218:1,7 218:16,22 219:2 226:11 2012 13:15,21 2013 80:1 97:19 103:8,11 104:7 104:11 105:6 106:6,8,15 107:10,18,23 108:8,13 109:16,21 110:5,7,14,24 111:10,15 112:7,8,9,16 113:8,16 115:4 116:23 120:17 121:17 124:9 129:20 130:12 130:25 131:5,7 131:11,25 132:19 137:6 152:11 215:18 2014 132:17 2015 39:7 63:16 2017 7:5 2018 2:17,21 24:24 26:4 34:19 58:8,10 80:1 96:25 101:18 103:21 104:8 107:16	108:1 109:17 110:3 111:12 111:15 112:17 113:9,16 115:4 119:10,15 131:25 136:1 146:22 147:2 165:25 166:16 178:1,18 181:4 181:8,13 183:1 195:21 215:21 219:5 236:11 2019 1:16,23 2:17 26:5,6 82:24 83:4 137:20 139:17 146:5,10 147:12,12,20 148:1 152:1 153:19 154:6 156:22 181:25 191:10 201:4 240:11 241:23 21st 25:18 26:12 22 39:8 40:24 41:3 155:25 158:20 159:9 159:20 163:24 234 2:20 236 2:20 239 240:7 241:4 241 1:15 25 95:20 96:5,18 103:5 25th 24:23 26 2:17,21 192:4 192:16 195:25 198:1,3,17 236:11 26th 240:10 28 82:19 214:6 2800 1:21 2:5 29 83:4 93:23 112:6 29th 59:11 68:4 82:24	38:7 55:4 69:23 93:14,15 93:15,19 94:2 94:10,13 95:5 95:17,24 96:3 141:21 158:7 214:22 234:13 234:16 3F 141:13 3:19 239:11 30 111:25 112:18 113:3 113:13,15 114:18 125:11 155:9 171:16 300 2:9,9 31 2:17 116:24 31st 149:6 34 2:19 35:8 36 22:24 365 106:19	5 5 55:15 61:14 71:6 94:10,13 96:21 138:9 139:16 205:25 206:10,20,23 211:15 5:30 138:9 50 118:11 221:20 222:22 500 139:6 5027 2:8 55402-2015 2:5 57117-5027 2:10	6 6 115:13,23 170:3 60 41:18 221:20 222:2,16 223:21 230:16 237:12 60s 138:8 60-some 223:18 69 48:11 116:16 116:21 69% 116:10	7 7 2:17 122:3 70 222:2 237:10 70s 138:8 700,000 125:8 75 174:17 78 174:18	8 8 49:20 50:1 96:22 162:6,10 162:10,11,13 162:13,20 170:3 80 237:9 800 1:21 2:4	9 9 96:22,22 162:6 162:13,20 201:19 9:03 1:23
--	--	--	--	--	---	--	--	---

Page 277

<p>90 41:19,24 237:6 97 38:6,12</p>				
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